No. 12,527

IN THE

United States Court of Appeals
For the Ninth Circuit

International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union, Local 16,

Appellants,

vs.

Juneau Spruce Corporation (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Division No. 1, at Juneau (hereinafter referred to as the "trial court") entered on May 20, 1949, upon a jury verdict, in favor of appellee and against both appellants in the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), together with appellee's costs and disbursements including an attorney's fee of Ten Thousand Dollars ($10,000.00). (T.R. 73-74.)

Appellee's cause of action was based on alleged unlawful activities by appellants arising out of an al-

leged jurisdictional dispute. Jurisdiction in the court below was alleged to exist under the provisions of Sec. 303 of the Labor-Management Relations Act, 1947, commonly known as the Taft-Hartley Act, 61 Stat. 158, 29 U.S.C. Supp. (1949), Sec. 187 (Second Amended Complaint, I, T.R. 2).[1] (Appendix, p. i.) By special appearance and motion to quash service of summons, appellant International Longshoremen's and Warehousemen's Union (hereinafter referred to as the "International") challenged the jurisdiction of the trial court over its person, and the purported service of summons upon it. (T.R. 7.) A demurrer of appellant International and appellant International Longshoremen's and Warehousemen's Union, Local 16 (hereinafter referred to as "Local 16"), challenged the jurisdiction of the trial court over the subject matter of the action, as well as over their respective persons. (T.R. 15.)

The trial court denied the motion and overruled the demurrer (T.R. 14), thus asserting its jurisdiction over both the subject matter of the cause and the persons of the appellants under the aforementioned section of the Act. Its accompanying opinion in support of these orders held that it was a District Court

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[1]The Labor-Management Relations Act, 1947, consisted of five titles. Title I contained the National Labor Relations Act, as amended; Title III was captioned, "Suits by and against Labor Organizations" and contained the provisions referred to in appellee's complaint. Throughout this brief the Labor-Management Relations Act, 1947, will be referred to as the "Act", and the National Labor Relations Act will be referred to as the "Labor Relations Act". The National Labor Relations Board, established by the National Labor Relations Act, will be referred to here as the "Board".

of the United States within the meaning of Sec. 303 of the Act, and, by implication, that this conclusion was determinative of the questions of jurisdiction. 83 F. Supp. 224 (1949). The cause proceeded to trial on April 22, 1949 (T.R. 109), and was submitted to the jury on the afternoon of May 12, 1949. (T.R. 1057.) On the following morning the jury requested and was given supplementary instructions. (T.R. 1057.) It returned its verdict that afternoon. (T.R. 1065.) Appellants' motions for a new trial and for judgment notwithstanding the verdict were denied by the trial court on May 20, 1949 (T.R. 70, 71), and the judgment from which this appeal is taken was entered that day. (T.R. 73-74.)

Jurisdiction of this court over the appeal is conferred by 28 U.S.C. Secs. 1291 and 1294(2). (Appendix, pp. ii-iii.)

STATEMENT OF THE CASE.

A. The Pleadings.

Appellee's second amended complaint (hereinafter referred to as the "complaint") can be briefly summarized as follows:

In addition to the jurisdictional allegation already adverted to, it stated the business of appellee to be that of lumber manufacturing (Complaint, V, T.R. 3-4), and identified the appellants International and Local 16 as labor organizations, the latter chartered by and affiliated with the former. (Complaint, III and IV, T.R. 3.) While Local 16's headquarters were

placed at Juneau, Alaska (Complaint, IV, T.R. 3), *the location of the headquarters or principal office of the International was omitted,* the complaint merely alleging that the International engaged in activities on behalf of its members in West Coast ports of the United States, in British Columbia, Dominion of Canada, and in the Territory of Alaska. (Complaint, III and IV, T.R. 3.)[2] Appellee's lumber manufacturing operations were alleged to include logging operations at Edna Bay, Alaska, milling, retailing and shipping functions at Juneau, Alaska, as well as retailing at Anchorage and Fairbanks, Alaska. (Complaint, V, T.R. 3-4.) The loading and unloading of barges at its mill in Juneau was declared to be an essential part of appellee's manufacturing and sales operations. (Complaint, V, T.R. 4.)

The majority of appellee's sales, it was averred, was made to customers in the United States (Complaint, V, T.R. 3-4), thus implying that appellee was engaged in interstate commerce within the meaning of the Act.

On this appeal, appellants concede that the foregoing allegations of the complaint were either proved upon the trial by appellee or established by stipulation of the parties.

The remaining allegations of the complaint assert its gravamen. It was alleged that following April 10, 1948, and until the date of the complaint, the appel-

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[2]Evidence at the trial established that the International's principal office was in San Francisco, California (T.R. 273) and that it had no office or place of business in Alaska. (Pl. Exh. 19, par. 5; T.R. 12.)

lants induced and encouraged appellee's employees at Juneau, Alaska, and the employees of other employers, to engage in a concerted refusal to perform services for appellee, or to handle or work on goods of appellee (Complaint, VII, T.R. 5), an object of such activities being "to force and require [appellee] to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons, including members of Local M-271, to whom said work [had theretofore] been assigned" (Complaint, VIII, T.R. 5-6.) The International Woodworkers of America, Local M-271 (hereinafter referred to as "Local M-271") was alleged to be a labor organization which represented all of appellee's employees at its mill and retail yard in Juneau, with immaterial exceptions, and which had been recognized and bargained with as such representative by appellee during the period following April 10, 1948. (Complaint, VI, T.R. 4-5.) It was further averred that for the same period a collective bargaining agreement in effect between appellee and Local M-271 recognized the latter's right to bargain for the employees in question. (Complaint, VI, T.R. 4-5.) It was also alleged that neither appellant had been certified by the National Labor Relations Board as the bargaining representative for employees performing the work of loading appellee's barges (Complaint, VIII, T.R. 6); but it was not alleged that Local M-271 had been so certified.[3]

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[3]Evidence at the trial showed that it had not been. (T.R. 1051, 1056.)

It was contended that the picketing and coercive statements of appellants following April 10, 1948, and the communication of the fact of such picketing to other labor organizations in the United States and Canada, caused appellee's employees at its mill in Juneau to refuse to work from April 10, 1948, to July 19, 1948, and forced appellee to close its mill for that period. When sufficient employees returned to work to permit the mill to be reopened on July 19, it was further claimed that appellants' activities prevented shipments of lumber to appellee's customers, again forcing closing of the mill on October 11, 1948. Finally, it was contended that the direct and proximate result of these activities of appellants caused damage to appellee in the sum of one million, twenty-five thousand dollars ($1,025,000.00). (Complaint, IX, T.R. 6-7.) Attorneys' fees of ten thousand dollars ($10,000.00) as well as the stated sum in damages were sought. (Complaint, X, T.R. 7.)

These allegations of the complaint were controverted by the appellants' answers. (T.R. 23-24, 29-31.) In addition, Local 16 pleaded as an affirmative defense the existence of a collective bargaining agreement between itself and the Waterfront Employers Association of Juneau, Alaska, to which the appellee was a party, and under the terms of which appellee had agreed and was required to assign to members of Local 16 the work of loading its barges with lumber. Under said agreement, it was claimed, members of Local 16 were employees of appellee. (Answer and Affirmative Defense, 15-17, T.R. 25-26.) Local 16, it

was alleged, had peacefully picketed the mill of the appellee on and after April 10, 1948, with the full knowledge, acquiescence and consent of Local M-271, in order to require the appellee to abide by said collective bargaining agreement. (Answer and Affirmative Defense, 18-19, T.R. 27.) The appellee denied the substance of these allegations of Local 16's affirmative defense. (Reply, V through VIII, T.R. 32-33.)

B. The facts.

The summary of the facts which follows is by no means exhaustive, but simply furnishes background for the Court's consideration of the questions raised on this appeal. To the extent that the argument concerning and the discussion of particular errors require further reference to the evidence, it will be made when appropriate.

The competency of particular evidence concerning the necessity for the appellee to close its mill for the second time on October 11, 1948, was challenged on the trial by appellants, and the admission of such evidence is included among the appellants' Specification of Errors. Certain of the evidence at the trial was conflicting, but since the verdict of the jury was in favor of appellee, all such conflicts are resolved in favor of appellee in the following summary. From conflicting evidence viewed in such a manner, from evidence the competence of which is not disputed by appellants,[4] and from uncontradicted evidence at the

[4] With the exception of testimony concerning the reasons for the suspension of appellee's operations on October 11, 1948, which is discussed below.

trial, the jury was warranted in finding the following facts to be true:

The appellee came into existence as a corporation and began its lumber manufacturing operations in the spring of 1947, when it acquired the business of Juneau Lumber Mills, Inc. The method of transfer did not take the form of a purchase of the corporate stock of the predecessor. Instead, by contract with Juneau Lumber Mills, Inc., the appellee purchased a sawmill and planing mill at Juneau, Alaska, logging equipment at Edna Bay, Alaska, retail yards at Juneau, Anchorage and Fairbanks, Alaska, together with all equipment used in those operations. None of the old company's accounts were assumed or acquired. (T.R. 113-118.) Shortly before the transfer date of May 1, 1947, notices had been posted advising the mill employees in Juneau that Juneau Lumber Mills, Inc., was to cease operations as of the close of business on April 30, 1947, and that persons desiring employment with appellee should apply the following day. (T.R. 121, 123.) All mill employees of the predecessor company did so apply and were hired. The operations of the appellee began on May 2, 1947, with the mill employees consisting of those formerly employed by Juneau Lumber Mills, Inc. (T.R. 123, 228.)

At the time of the take-over, the appellee's predecessor was a party to a collective bargaining agreement with Local 16 whereby it had agreed to hire, and was hiring, longshoremen represented by that labor organization to perform all longshore work in connection with its operations. (Def. Exh. C; T.R.

918-919.) In practice, the work performed under that contract consisted of the loading of lumber aboard the tugs or boats of purchasers at the company's docks in Juneau. (T.R. 170-171, 232.) For this work the longshoremen were paid by the appellee's predecessor. Lumber which was shipped by commercial steamer was also loaded aboard ship by longshoremen represented by Local 16, who in those instances were employed directly by the steamship companies. (T.R. 155.)

These kinds of shipment accounted for but a small proportion of the predecessor's production at the time of the take-over, the greater proportion of production at that time going to the United States Army Engineers, which used its own personnel to pick up its lumber at the company dock. (T.R. 154-155, 183.) Until September, 1947, the situation with respect to the disposition of production remained the same for appellee as it had for its predecessor. Appellee continued to use longshoremen for the work covered under its predecessor's contract with Local 16 (T.R. 174-175, 933); the bulk of its production continued to go to the Army Engineers.

In September, 1947, appellee's contract with the Army Engineers was cancelled. (T.R. 183.) In anticipation of this, and of the necessity for it to dispose of most of its lumber elsewhere, the appellee had leased sea-going barges, to be used in shipping the bulk of its lumber to the United States. (T.R. 187.) That portion which the appellee had theretofore been shipping to the United States had gone by commercial

steamer (T.R. 157), following the practice of appellee's predecessor, which had never employed its own sea-going barges for that purpose. (T.R. 982.)

In October, 1947, instead of using longshoremen for the work, the appellee employed its own mill employees to place the first load of lumber on this sea-going barge. (T.R. 185-187.) These employees had never before loaded lumber aboard sea-going craft for shipment to the United States. (T.R. 982.) Immediately after the barge was loaded (T.R. 185), a committee of Local 16 visited the appellee, to request that the longshoremen it represented be given the barge-loading work. (T.R. 188.) The appellee rejected this request. (T.R. 189.) A second barge was loaded in the same manner in March, 1948. (T.R. 202.) Promptly thereafter a delegation from Local 16 appeared before a membership meeting of Local M-271 and explained to those in attendance its position that longshoremen, rather than the mill employees whom Local M-271 represented, were entitled to perform the work of loading the sea-going barges. (T.R. 832-836.) After the longshoremen's delegation had left, the Local M-271 meeting voted unanimously as follows:

> "Motion moved and seconded to go on record to not load barges. We figure this work belongs to the longshoremen." (Def. Exh. A; T.R. 838-839.)

Within the following week, a delegation consisting of representatives of Local M-271 and Local 16 informed Eugene S. Hawkins, Vice-President and General Manager of appellee, that Local M-271 had agreed that the work of loading the barges belonged to the

longshoremen. Hawkins was further informed that the members of Local M-271 would honor the picket line which Local 16 intended to place before appellee's mill if the latter persisted in its refusal to permit longshoremen represented by Local 16 to perform the work of loading the barges. (T.R. 203-206.) Even though the company's cost of operations would not have been materially affected by acceding to the joint request of the two locals (T.R. 252-253, 256-257, 266), and the appellee had earlier informed the longshoremen that it would accept such an agreement between them (T.R. 182), the appellee insisted that the work be done by Local M-271. (T.R. 261.)

A day or two later, on April 9, 1948, Local M-271 called a meeting which was attended by the overwhelming majority of the mill employees (T.R. 383, 404, 840), again to discuss the question of the longshoremen's right to perform the barge loading work and Local M-271's position with respect to the impending picket line. The minutes of the previous meeting recognizing the longshoremen's right to perform the work were read and approved and a general discussion ensued. (T.R. 841.) Those in attendance resolved unanimously to honor Local 16's picket line if it was established. The official minutes of the meeting read as follows:

> "Special meeting, April 9, 1948. Discussion on Conditions Relative to ILWU loading barges. Move made and seconded to take vote on whether to cross picket line—again a unanimous vote to honor picket line of ILWU." (Def. Exh. A, T.R. 842.)

The following morning Local 16 established its picket line at the appellee's mill, and the mill employees honored it in accordance with their resolution passed the previous evening. (T.R. 843.)

From April 10 to July 19, 1948, appellee's mill was closed. (T.R. 310.) During that entire period the appellee refused to negotiate with the unions concerning a settlement of the dispute on terms agreeable to both unions. (T.R. 781, 891, 991, 1027.) On the contrary, it insisted that Local M-271 perform the work of barge-loading, although that organization continued to maintain that the longshoremen represented by Local 16 were entitled to the work. (T.R. 323-325.) In May (T.R. 453), appellee telephoned from its office in Portland to the President of Local M-271 and asked him to come to that city to see the officers and counsel for his International union. Appellee paid the expenses of the trip. (T.R. 534-535.) After the return of its President from Portland, Local M-271 entered into an agreement with appellee in which that Local agreed:

> "* * * to cross the picket line established by Local 16, ILWU, and claim jurisdiction of all work performed by employees of the Juneau Spruce Corporation according to our contract, also the loading of company-owned or leased barges with company-owned gear * * *" (Pl. Exh. 7.)

This agreement represented the first claim by Local M-271 to the work in dispute and was followed by the immediate resumption of operations. (T.R. 439.)

Thereafter, another barge was loaded with lumber by mill employees and was shipped from the mill at Juneau to Prince Rupert, British Columbia, on August 27, 1948. The longshoremen at that port refused to unload the barge because of the existence of the dispute between Local 16 and the appellee. (Pl. Exh. 12; T.R. 619.) The barge was rerouted to Tacoma, Washington, where it was unloaded. (T.R. 687, 788.)

On October 11, 1948, the manufacturing operations at the mill ceased again. The reason advanced in testimony at the trial was that there was no more room for the storage of lumber on appellee's dock. (T.R. 696.) The appellee, it was contended, had been unable to have its lumber unloaded at any port in the United States, causing the over-taxing of its storage capacity in Juneau.[5] (T.R. 692-695.) Following the cessation of manufacturing operations at that time, extensive repairs and improvements were undertaken throughout appellee's operations in Juneau. (T.R. 696-697.) The picketing by Local 16 continued until the commencement of the action, at which time appellee's manufacturing operations had still not been resumed. (T.R. 413.)

C. Discussion of the questions involved.

1(a). The appellants contend that the failure of the complaint to allege that the National Labor Relations Board had made its decision and determination of the jurisdictional dispute out of which the cause of

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[5]The error committed by the trial court in admitting hearsay evidence concerning this alleged inability to unload in the United States is discussed among appellants' Specification of Errors. (See page 29, *infra*.)

action allegedly arose deprived the trial court of jurisdiction of the subject matter of the cause. The basis for this contention of the appellants lies in the interrelationship between Secs. 8(b)(4)(D) and 10 (k) of the Labor Relations Act and Sec. 303(a)(4) of the Act, and will be fully discussed in argument.

If the trial court lacked jurisdiction of the subject matter of the cause of action for this reason, the judgment must, of course, be reversed as to both appellants. The appellants raised this question by their demurrer. (T.R. 15.)[6]

1(b). Related to the question of the trial court's lack of jurisdiction over the subject matter of the action is the failure of the complaint to state a cause of action against appellants. The foregoing basis upon which the appellants contend the court below lacked jurisdiction may also result in a holding that the complaint was lacking in an essential element. It will thus be shown that even if it be considered that the court below had jurisdiction over the subject matter of the action, the failure to plead a prior determination of the Board made appellee's cause of action fatally defective.

The failure of the complaint to state a cause of action was raised by appellants' motion for judgment notwithstanding the verdict. (T.R. 67.)[7]

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[6]They are entitled in any case to raise this question on appeal here. *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Southern Pacific Co. v. McAdoo*, 82 F.2d 121 (9 Cir., 1936).

[7]This question is also reviewable on appeal in any case. *Slacum v. Pomeroy*, 6 Cranch. 221 (1810); *U.S. Fidelity etc. Co. v. Whittaker*, 8 F.2d 455 (9 Cir., 1925).

2. Appellant International by its special appearance on motion to quash service of summons raised the question of the jurisdiction of the trial court over its person. (T.R. 7.)[8] The trial court, conceiving itself to be a District Court of the United States, denied the motion to quash, and held that since the International allegedly had an agent in the territory, it was subject to its jurisdiction although it maintained no office or place of business therein.[9]

3 and 4. In addition to these questions, appellants advance a number of others which require a reversal of the judgment below. These fall into two categories: (1) errors in the instructions of the court; (2) errors in the admission and exclusion of evidence. The rulings of the trial court in both categories were challenged at the trial by appropriate objections, which are specifically enumerated in the Specification of Errors (*infra*, pp. 16-33).

QUESTIONS INVOLVED.

1. Does jurisdiction vest in any court to entertain an action for damages pursuant to the provisions of Secs. 303(a)(4) and 303(b) of the Act prior to a determination of dispute made by the National Labor

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[8]Such lack of jurisdiction may be asserted upon appeal. *Endrezze v. Dorr Co.*, 97 F.2d 46 (9 Cir., 1938); *Alford v. Addressograph etc.*, 3 F.R.D. 295 (D.C. Calif., 1944).

[9]This holding was based upon the misconception that the provisions of § 301 of the Act were here applicable. We will demonstrate below that they were not. This same misconception resulted in an erroneous holding that service upon the alleged agent was service upon the International.

Relations Board pursuant to Sec. 10(k) of the Labor Relations Act, or, in the alternative, is such a prior determination by the Board an essential element of a cause of action under said provisions?

2. Is the District Court for the Territory of Alaska a District Court of the United States within the meaning of Sec. 303(b) of the Act?

3. Did the trial court err in its instructions to the jury?

4. Did the trial court err in admitting and excluding certain evidence at the trial?

SPECIFICATION OF ERRORS.

1. The trial court erred in holding that it had jurisdiction of the subject matter of the action, or, in the alternative, that the complaint stated a cause of action.

2. The trial court erred in holding that it was a District Court of the United States within the meaning of Sec. 303(b) of the Act, and thus in holding that it had jurisdiction of the person of appellant International, that appellant had been properly served and that the provisions of Sec. 301 of the Act generally were applicable.

3. The trial court erred in its instructions to the jury as follows:

(a) In giving Instruction No. 4:

"The Taft-Hartley Act further provides that any labor organization shall be bound by the acts of

its agents and that, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the acts done were actually authorized or subsequently ratified shall not be controlling.

"Since a labor organization can act only through its officers and agents, it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who, by the authority of his principal, transacts his principal's business or some part thereof and represents him in dealing with third persons.

"It is undisputed that Germain Bulcke, John Barry and the witness Verne Albright were, during the time covered by this controversy, officers of International. Hence, they were agents. But it is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, if you find that such acts were committed, was within the scope of their employment.

"A person acts within the scope of his employment when he is engaged in doing for his employer either the acts consciously and specifically directed or any act which is fairly and reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work. If, in doing such an act, a person acts wrongfully, the wrongful act is nevertheless within the scope of his employment.

"The scope of employment is to be determined not only by what the principal actually knew of the acts of his agent within his employment but also by what in the exercise of ordinary care and

prudence he should have known the agent was doing." (T.R. 49-50.)

Appellants' demurrer raised the issue of whether the trial court was a District Court of the United States and whether the provisions of Sec. 301 of the Act applied to the case. This instruction, based upon Sec. 301, followed the erroneous determination of the trial court on these points.

(b) In giving Instructions Nos. 6 and 7:

"6. If you find from a preponderance of the evidence that during the period stated the defendants, acting separately or jointly, engaged in or induced or encouraged plaintiff's employees at Juneau, Alaska, to engage in, a concerted refusal in the course of their employment to manufacture, process, transport or otherwise handle or work on any lumber, or to perform any services for the plaintiff, and that the object thereof was to force or require the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom such work had been assigned, and that such acts directly and proximately caused pecuniary loss to the plaintiff, your verdict should be for the plaintiff in such amount as you find it has been damaged, not exceeding in any event the amount sued for. On the other hand, if you do not so find, your verdict should be for the defendants.

"In this connection you are instructed that, if you find from a preponderance of the evidence that the defendants, through their officers or agents acting within the scope of their employment, entered into a conspiracy or understanding to commit the aforesaid acts or any of them for

the object or purpose stated, or acted jointly or in pursuance of a common purpose or design, then from the time of entering into such a conspiracy or understanding everything that was done, said or written by any of the officers or agents of either in furtherance of such conspiracy or understanding and to effect the object or purpose thereof, regardless of whether done, said or written in Alaska or elsewhere, is binding on both of the defendants just as though they themselves, through their officers or agents, had done such acts or made such statements, and if the object of the conspiracy was accomplished, resulting in damage, each is liable for the whole thereof regardless of the degree of participation in the commission of the acts charged, or any of them.

"A conspiracy, common purpose or design may be proved by direct evidence or by proof of such circumstances as naturally tend to prove it and which are sufficient in themselves to satisfy an ordinary prudent person of the existence thereof. Therefore, it is not necessary that such a combination or understanding be shown to be in writing. It is sufficient if the evidence shows a combination of or cooperation between two or more persons to accomplish a common purpose.

"On the other hand, if you find that the defendants did not act in concert or in pursuance of a common purpose or design, you will consider the case against each defendant separately, and you may find either or both or neither of them liable." (T.R. 51-53.)

"7. You are instructed that two or more persons or organizations may participate in a wrong although they do so in different ways, at different

times and in unequal proportions. One may plan and the other may be the actual instrument in accomplishing the mischief, but the legal blame will rest upon both as joint actors. Accordingly, one who directs, advises, encourages, procures, instigates, promotes, aids or abets a wrongful act by another is as responsible therefor as the one who commits the act, so as to impose liability upon such person to the same extent as if he had performed the act himself." (T.R. 53.)

Appellants objected to said instructions on the ground that it was erroneous to charge the jury concerning a conspiracy, where none was alleged in the pleadings (T.R. 1053), and on the further ground that the instructions permitted a finding against the appellant International alone, whereas the entire theory of the appellee was that the International could be held only if Local 16 were liable. (T.R. 1055, 1044-45.)

(c) In giving Instruction No. 11:

"You are instructed that plaintiff's Exhibit No. 20, consisting of a certified copy of the determination of the National Labor Relations Board in the controversy out of which this action arises, can be considered by you only for the purpose of showing that no union has been certified at plaintiff's plant, and that defendants' Exhibit C, introduced for a limited purpose, is not binding on the plaintiff and may not be so considered."

Appellants objected to said instruction on the ground that it improperly limited the jury's consideration of appellants' Exhibit C (i.e., the contract

between Local 16 and the Waterfront Employers of Juneau, to which appellee's predecessor was a party), and removed from the jury the material issue of fact whether a contract existed between appellee and Local 16.

(d) In giving Supplementary Instruction No. 2:

"The issues in this case are simple and few. You are instructed that it is uncontradicted that the members of Local 16 engaged in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff and that this was for the purpose of forcing and requiring the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned.

"The only issues, therefore, which remain for your consideration are whether damages proximately resulted from such concerted refusal and whether the International engaged in this concerted refusal to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff. Whether it did so engage depends on what its officers and agents did. If you find that the International, acting through its officers and agents, induced Local 16 or any other of its Locals to engage in such concerted refusal, the International would be equally liable." (T.R. 1100-1101.)

Appellants objected to said instruction on the ground that it directed a verdict against Local 16 on the matter of the liability of the Local and removed

from the jury all questions concerning the liability of Local 16 other than the question of damages, and on the further ground that the initial instructions concerning the necessity for establishing the separate liability of each appellant for damages, if any existed, were nullified by said instruction. (T.R. 1059.)

(e) In giving Supplementary Instruction No. 3:

"With reference to the liability of Local 16 and the International for the acts of its agents and whether their agents acted within the scope of their employment, you are further instructed that, if you find from a preponderance of the evidence that the agents of the defendants decided that the defendants, or either of them, should engage in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any service for plaintiff and that thereafter Local 16 and International became engaged in such a refusal, this would constitute a ratification of the acts of their agents, and it would then be unnecessary to determine whether such acts of their agents were within the scope of their employment. In other words, labor organizations are liable not only for the acts of their officers or agents done within the scope of their authority or employment but also for the acts done outside of the scope of their authority and employment which they thereafter ratify.

"Ratification takes place where the principal, with full knowledge of the acts of the officer or agent, approves or adopts such acts or accepts the benefits thereof.

> "In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts of its officers and agents and, hence, there is no issue for you to decide as to Local 16." (T.R. 1101-1102.)

Appellants objected to said instruction on the ground that it improperly stated the law of agency, and on the further ground that it in effect removed from the jury even the question of whether Local 16's conduct proximately caused damage to the appellee. (T.R. 1060.)

(f) In giving Supplementary Instruction No. 4:

> "In determining the scope of employment of the officers and agents of International you should consider all the evidence, oral and documentary, in order to ascertain the power and authority of International and its relationship to its Locals, and particularly whether it counsels, advises, intercedes on behalf of, or acts for its Locals or is obligated under its constitution to do so in labor disputes, whether its Locals of the International itself makes the decision to call a strike or engage in a concerted refusal such as the kind here dealt with, and whether thereafter the International calls or is empowered to call upon its Locals to join in such strike or concerted refusal to work, as well as all the other facts and circumstances in the case.
>
> "Upon determining the power and authority of the International in such matters, you will then be in a position to determine the scope of employment and authority of its officers and agents. Ordinarily the question whether a certain act is

within the scope of employment of an agent of a labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. Here the acts alleged are not of that kind. In determining the scope of authority and employment of officers and agents of International you may consider whether their acts were related to the power and authority of International, the character of such employment, the nature of the act or acts alleged, particularly with reference to whether such act or acts are such as are usually done in labor disputes, and whether the act or acts were for the benefit or in the prosecution of the business of the International, remembering however that an act may be unlawful and still be within the scope of the employment or authority of the agent." (T.R. 1102-1103.)

Appellants objected to said instruction on the ground that it likewise misstated the law of agency. (T.R. 1060.)

(g) In refusing to give appellants' requested Instructions Nos. 1 and 2:

"1. You are instructed that it is the public policy of the United States that—

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and

above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of the Labor Management Relations Act of 1947, oftentimes called the 'Taft-Hartley Act', in order to promote the full flow of commerce, to prescribe legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (T.R. 34-35.)

"2. The Taft-Hartley Act was enacted in the interest of public policy to avoid economic strife and warfare, and so if you find from a consideration of all the evidence in this case that the action of the Juneau Spruce Corporation in refusing to accede to the demand of IWA M-271 to turn over the loading of barges to Local 16 was unreasonable or unjustifiable, in view of that provision, plaintiff is not entitled to recover any damage it may have sustained on account of such unreasonable or unjustifiable refusal to bargain.

"This policy is applicable only to the territorial limits of the United States and not to Canada." (T.R. 35-36.)

Appellants objected to the failure of the court to give said instructions on the ground that such instructions stated the public policy of the Act which it was appropriate for the jury to consider as bearing upon a defense to the action or in mitigation of damages. (T.R. 1046.)

(h) In refusing to give appellants' requested Instruction No. 11:

> "Labor contracts may be oral or in writing, or partly oral and partly in writing. They may be made through formal negotiations between the parties or be adopting the provisions of another contract existing between the same or other parties, or by adopting the customs and practices in a trade or industry which have been acquiesced in over a period of time.
>
> "If you find from a consideration of the evidence in this case that an agreement existed between Local 16 and the Juneau Lumber Mills, under which Local 16 performed all longshore work needed by Juneau Lumber Mills and that the plaintiff in this case adopted such agreement and hired members of Local 16 to do its longshore work, it may be fairly concluded that plaintiff adopted the contract formerly existing between Juneau Lumber Mills and Local 16 and it is bound by that adoption, and is required to carry out the terms thereof in good faith.
>
> "A labor contract, whether it be in writing or oral, or partly in one and partly in the other, should be construed in the light of all the facts and circumstances affecting the subject matter with which it deals. And you are authorized in arriving at a decision in this case to consider all

evidence introduced relating to the manner in which the parties themselves interpreted the provisions of that contract or agreement." (T.R. 41-42.)

Appellants objected to the court's refusal to give said instruction on the ground that it removed from the jury the question of whether or not a contract existed between appellee and Local 16. (T.R. 1049.)

(i) In refusing to give appellants' requested Instructions Nos. 12 and 13:

"12. You are instructed that section 201 of the Taft-Hartley Act provides as follows:

"That it is the policy of the United States that:

" '(a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

" '(b) The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or

by such methods as may be provided for in any applicable agreement for settlement of disputes; and

" '(c) Certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.' " (T.R. 43-44.)

"13. Section 204 of the Taft-Hartley Act provides as follows:

" '(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall:

" '(1) Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provisions for adequate notice of any proposed change in the terms of such agreement;

" '(2) Whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously;

> "'(3) In case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this act for the purpose of aiding in a settlement of the dispute.'" (T.R. 44.)

Appellants objected to the court's refusal to give said instructions on the ground that said refusal removed from the consideration of the jury matters which were material to appellants' defenses. (T.R. 1049-1050.)

(j) In refusing to give appellants' requested instruction concerning Sec. 8(c) of the Labor Relations Act, which reads as follows:

> "(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Appellants objected to the court's refusal to give said instruction on the ground that the agency principles upon which liability is predicated in an action of the character involved in this case would be otherwise too broadly stated. (T.R. 1060.)

4. The trial court erred in its rulings on evidence as follows:

(a) In admitting hearsay testimony concerning the ability of appellee to unload its lumber at various ports in the United States and Canada. The testimony admitted and the objections made to its admission appear in the record as follows:

"Q. Mr. Schmidt—Mr. Schultz, I am sorry—did you make any investigation or cause any to be made for you regarding the possibility of shipping through other ports in British Columbia?

A. No.

Q. Now, I am talking about at all times since you took over as Manager down there, you took over—at all times since you took over the Juneau Spruce Corporation's operations and management, did you attempt to ship to any other places on Puget Sound than Tacoma?

A. We investigated other places, but we didn't try to ship to other places.

Q. What areas did your investigation cover?

A. Port Townsend and Anacortes and Seattle.

Q. Just those three places?

A. And Tacoma.

Q. And Tacoma. And what was the result of that investigation?

A. That——

Mr. Andersen. I am going to object to this as calling for a conclusion and opinion of the witness, may it please the Court.

The Court. If he knows he may answer.

A. The ports of Tacoma and Seattle were found to be the only ones we would have with proper facilities down in Puget Sound for disposing of the products.

Q. And were they open to you—Seattle and Tacoma?

A. No.

Q. Now, did you actually try shipping any to Seattle?

A. Yes.

Q. Were you successful in getting it unloaded?

A. No.

Q. Do you know why?

Mr. Andersen. The same objection, your Honor.

The Court. Objection overruled.

Q. Do you know why?

A. Yes.

Q. What was the reason?

A. The tugboat captain was told not to pull into the dock.

Mr. Andersen. I object to that as hearsay.

Q. What was the reason.

A. He was not allowed to dock.

Mr. Andersen. May it please the Court, I move the previous answer be stricken.

The Court. Yes, that part of the previous answer based on conversation will be stricken.

Mr. Banfield. Will the Reporter repeat the last question and the last answer?

Court Reporter. Q. 'What was the reason?' A. 'He was not allowed to dock.'

Q. Who did you have make this investigation for you?

A. Mr. Harris.

Q. Who is Mr. Harris?

Mr. Andersen. May it please the Court, I move all this witness' testimony be stricken. It turns out that somebody else made the investigation for him. Obviously it is hearsay.

Mr. Banfield. We are entitled to show what agents of the company——

The Court. This question is competent. The objection is overruled as to this question. We will see what develops.

Q. Who was Mr. Harris?

A. An employee of the State Steamship Company.

Q. Doing this on your behalf?

A. Yes, sir.

Q. At your instructions?

A. Yes, sir.

Q. Did anyone else make any investigation for you?

A. Mr. Rogers.

Q. Who is Mr. Rogers?

A. He is our Portland attorney.

Q. Was there anyone else engaged in this investigation?

A. I was down there myself one trip.

Q. And was the result of all these investigations the same?

A. All the same.

Q. Did Mr. Winston Jones make an investigation?

A. Yes.

Q. Who is Winston Jones?

A. He is the District Manager of the State Steamship Company in Seattle.

Q. Is he the same Winston Jones that formerly was with the Alaska Transportation Company?

A. That is right.

Q. Did Mr. Jones and Mr. Harris make any investigation in Canada?

A. Mr. Harris did.

Q. When was that?

A. That was the time that the barges were first started down to Prince Rupert.

Q. What was the result of his investigation?

A. Those barges were unloaded.

Q. You say that this was at the time that what?

A. You asked me if anyone made investigations at other ports. Mr. Harris did, but the lumber was unloaded in that instance.

Q. Was any investigation made in Canada thereafter?

A. I have had communications with Mr. Youngs.

Q. What was the result of that investigation?

Mr. Andersen. I object to that as hearsay and calling for the conclusion and opinion of the witness.

The Court. If he knows he may answer.

A. We were advised the longshoremen would not unload the lumber.

Q. Did that investigation apply in one place or more than one place?

Mr. Andersen. Same objection, hearsay and calling for the conclusion and opinion of the witness.

The Court. If he knows he may answer.

A. Mr. Youngs; it was just Prince Rupert." (T.R. 692-695.)

(b) In excluding, except for a limited purpose, appellants' Exhibit C[10] upon which appellant Local 16 relied to establish the existence of an implied contract between itself and appellee. (T.R. 927, 930.)

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[10]See, *supra*, page 20.

SUMMARY OF THE ARGUMENT.

I.

A determination by the board under Sec. 10(k) of the Labor Relations Act is a jurisdictional prerequisite to an action for damages under Sec. 303(a) (4) of the Act.

A. The inter-relation between Secs. 8(b)(4)(D) and 10(k) of the Labor Relations Act and Sec. 303 (a)(4) of the Act compels this conclusion.

1. A jurisdictional prerequisite to an action under Sec. 303(a)(4) of the Act is the same as that to a proceeding under Sec. 8(b)(4)(D).

2. A Sec. 10(k) determination by the Board is a jurisdictional prerequisite to a finding that conduct is unfair under Sec. 8(b)(4)(D).

B. The doctrine of primary jurisdiction compels this conclusion.

II.

The trial court erred in holding that the District Court for the Territory of Alaska is a District Court of the United States, and prejudicial error to appellants resulted therefrom.

A. The District Court for the Territory of Alaska is not a District Court of the United States.

B. As a result of misconceiving its status, the trial court committed error prejudicial to appellants concerning matters of jurisdiction, service and agency.

III.

Prejudicial error to appellants resulted from the trial court's instructions to the jury.

IV.

Prejudicial error to appellants resulted from the trial court's rulings on evidence.

ARGUMENT.

I.

A DETERMINATION BY THE BOARD UNDER SEC. 10(k) OF THE LABOR RELATIONS ACT IS A JURISDICTIONAL PREREQUISITE TO AN ACTION FOR DAMAGES UNDER SEC. 303(a)(4) OF THE ACT.

A. THE INTER-RELATION BETWEEN SECS. 8(b)(4)(D) AND 10(k) OF THE LABOR RELATIONS ACT AND SEC. 303(a)(4) OF THE ACT COMPELS THIS CONCLUSION.

1. The jurisdictional prerequisite to an action under Sec. 303(a)(4) is the same as that to a proceeding under Sec. 8(b)(4)(D).

The language of Sec. 8(b)(4)(D) of the Labor Relations Act and Sec. 303(a)(4) of the Act is virtually identical. Sec. 8(b)(4)(D) provides:

> "It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is forcing or requiring any

employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Sec. 303(a)(4) provides:

"It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is——

* * * * * * *

"forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work * * *"

That the same conduct is addressed by both sections is demonstrated not only by this identity of language, but also by the legislative history. In dis-

cussing the provisions of the Conference Bill which was subsequently adopted into the present Act, Representative Lesinski made the following statement in connection with Sec. 303 (a)(4):

> "* * * Employers are given a cause of action to recover any damages caused by the activities made unfair by section 8 (b) (4)." (93 Daily Cong. Rec. 9475, June 19, 1947, *Legislative History,* p. 12.)[11]

Stated in another way, only conduct made unfair by Sec. 8 (b) (4) (D) is actionable under the provisions of Sec. 303 (a) (4).

2. A Sec. 10(k) determination by the Board is a jurisdictional prerequisite to a finding that conduct is unfair under Sec. 8(b)(4)(D).

Sec. 10(k) of the Labor Relations Act provides:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary

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[11]The Legislative History of the Labor-Management Relations Act of 1947 has been published by the Board in two volumes issued by the Government Printing Office in Washington, D.C., in 1948. For ease of reference, wherever citations to the legislative history occur in this brief, the specific reference to the bill, committee report or congressional debate in question will be followed by a citation to the page of this two-volume Legislative History at which the particular reference appears, as follows: *Legislative History,* page ....

adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The Board has consistently construed this provision to mean that it must make a determination under the section before a complaint charging a violation of Sec. 8(b)(4)(D) can issue, under Sec. 10(b) of the Act.[12]

The first instance of this interpretation by the Board is given by the Rules and Regulations and Statements of Procedure which it issued under the provisions of Sec. 10(k). Sec. 203.77 of the Board's Rules and Regulations provides:

> "If, after issuance of certification by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the certification, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director may proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 203.9 to 203.51, inclusive, shall, insofar as applicable, govern."

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[12]The portions of Sec. 10(b) relevant to the issuance of complaints by the Board provide:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ."

Section 202.34 of the Board's Statements of Procedure provides:

> "*Compliance with certification; further proceedings.*—After the issuance of certification by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that parties are complying with the certification, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b),(4)(D) of the act, and the proceeding follows the procedure outlined in sections 202.8 to 202.15."

This initial interpretation by the Board of the relation between Secs. 10(k) and 8(b)(4)(D) with respect to all charges that the latter section was being violated received a flat challenge in the case of *Juneau Spruce Corp.*, 82 NLRB 650 (1949),[13] but the challenge was rejected, and the Board held squarely that it had no power to issue a complaint pursuant to the provisions of Sec. 8(b)(4)(D) prior to a determination by it under the provisions of Sec. 10(k). That case arose out of the same dispute which resulted in the filing of the action below in the trial court. The appellee here was the charging party before the Board. It contended that Sec. 10(k) gave the Board power to

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[13] In an earlier case, *Moore Drydock Company*, 81 NLRB 1108 (1949), the Board made an identical holding, although there the issue was not raised by any of the parties.

hear and decide a jurisdictional dispute only where the rights of two or more competing unions in cases of overlapping certifications or orders of the Board were involved. It was argued that Sec. 10(k) was inapplicable in all other instances of inter-union conflict, and that in such cases the Board had the duty of proceeding at once to hearing on the substantive charge of violation of Sec. 8(b)(4)(D).

The Board answered this contention of the appellee here as follows:

> "We do not agree. We have held in the *Moore Drydock Company* case that, reading Sections 8(b)(4)(D) and 10(k) together, as we are required to do by the amended Act, the Board has no choice but to proceed 'to hear and determine' the dispute out of which the alleged unfair labor practice arose. The purposeful postponement of further proceedings (during the initial 10-day period); *the opportunity afforded the rival unions to reach a settlement* or to agree upon methods for reaching an adjustment of the dispute; the requirement that the charge be dismissed upon a showing that the dispute has been settled (during the initial stage) or compliance effected after the Board decision (the determination of dispute such as that made here), all lend persuasive support to the view that *Congress intended the Board first to attempt to resolve the controversy by means of a Section 10(k) determination.* It is only where it still is necessary thereafter to proceed with the unfair labor practice charge under Section 8(b)(4)(D)—in the event of noncompliance, for example, with the Determination of Dispute—that a complaint may be issued under

Section 10(b). Thus, a Section 10(k) hearing has an effective function, and the Board a definite responsibility to discharge thereunder, to obviate the conventional unfair labor practice proceeding through a statutory device for expediting adjustment of such disputes. Moreover, in the absence of language specifically limiting the application of Section 10(k) to certain situations *only,* or even persuasive legislative history in support of such restricted application, the Board is obliged to give the effect to that Section which its language requires. The interpretation adopted here gives practical meaning to the concluding sentence in Section 10(k) which reads: 'Upon compliance by the parties to the dispute with the decision of the Board or *upon such voluntary adjustment of the dispute, such charge shall be dismissed.*" (Italics supplied; footnotes in the Board's decision are omitted.)

In subsequent cases, the Board has consistently followed this view of its function under Sec. 10(k) and the relation of that section to Sec. 8(b)(4)(D). In *Irwin-Lyons Lumber Co.,* 82 NLRB 916 (1949), the contention was made on a petition for rehearing by one of the parties that the hearing conducted under Sec. 10(k) is governed by the Administrative Procedure Act. In denying the motion for rehearing, the Board stated:

"We do not agree. Under Section 202.32 of the Board's Rules and Regulations—Series 5, as amended, the hearing under Section 10(k) is nonadversary in character, and, according to the procedure adopted therefor, conducted in the same

> way as a hearing in a representation proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies."

See, also, *Winslow Bros. and Smith Co.,* 90 NLRB No. 188 (1950); *Stroh Brewery Co.,* 88 NLRB No. 169 (1950); and *Ship Scaling Contractors Ass'n.,* 87 NLRB No. 14 (1949).

Finally, in the case of *Juneau Spruce Corp.,* 90 NLRB No. 233 (1950), the Board made it plain that a determination by it under Sec. 10(k) which had not been complied with was essential to a finding of a violation of Sec. 8(b)(4)(D). The Board stated:

> "*All* the factors essential to a violation of this section of the amended Act are present: By picketing the Company's premises, the Respondents induced and encouraged the Company's mill and millyard employees to engage in a concerted refusal in the course of their employment to perform services for the Company; the Respondents' object was to force the Company to assign the bargeloading work to the members of Local 16, or workers dispatched by Local 16, instead of to the mill and millyard employees; the Company

> was not failing to conform to a certification of the Board determining the bargaining representative of the employees performing the bargeloading work, for there has been no such certification; *and, finally, the Respondents did not comply with the Board's Decision and Determination of Dispute in the previous proceeding held under Section 10(k) of the Act.*" (Italics supplied; footnotes in the Board's decision are omitted.)

It is submitted that this construction of the two sections by the Board is the only proper one that can be made.[14] It is supported not only by the reasons advanced by the Board in the first *Juneau Spruce* case and other decisions, but also by the legislative history of Secs. 10(k) and 8(b)(4)(D).

The treatment which the respective Houses of Congress gave jurisdictional disputes in the bills which originated in each was vitally disparate. H.R. 3020, the House version of the legislation, outlawed entirely concerted action by labor organizations arising out of

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[14]As the interpretation of the administrative agency charged with the duty of enforcing the legislation, it is entitled to great weight. *New York, New Haven and H.R. Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906); *Shapiro v. United States*, 335 U.S. 1 (1948). Particularly is this true with respect to the legislation here under discussion. Sections 401, 402, and 403 of the Act established a joint congressional committee known as the Joint Committee on Labor-Management Relations, a duty of which was to report to Congress on the administration and operation of existing federal laws relating to labor relations. The construction which the Board has placed on Sec. 10(k) has come directly to the attention of Congress through the reports of this committee. (Rep. No. 986, Part 3, 80th Cong., 2d Sess., at page 57.) The continued existence of the Act in its original state attests to the fact that the Board is carrying out the legislative intent in its administration of Secs. 10(k) and 8(b)(4)(D).

jurisdictional disputes.[15] The Senate, however, adopted a different approach. Recognizing that jurisdictional disputes were in a special category and that experience had shown that obstructions to commerce arising from them could best be removed not by outlawing them completely but by a fair adjustment of them, the Senate provided for such an adjustment in its bill, S. 1126. Thus, when the Senate bill was reported to the Senate by its Committee on Labor and Education, it was made clear that Sec. 10(k) of that bill had been derived from the bill originally introduced by Senator Morse to deal with jurisdictional disputes.[16]

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[15]This was accomplished by the provisions of Secs. 2(15) and 12(a)(3)(A).

Section 2(15) provided as follows:

"The term 'jurisdictional strike' means a strike against an employer, or other concerted interference with an employer's operations, an object of which is to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." (*Legislative History,* pages 42-43.)

Section 12(a)(3)(A) provided as follows:

"The following activities, when affecting commerce, shall be unlawful concerted activities: * * *

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises." (*Legislative History,* pages 77-78.)

[16]Senator Morse stated:

"I am very happy that on March 10, in a speech which I am sure my colleagues at the time thought was too long, I laid the foundation for my proposals for amendments to the Wagner Act. At that time I offered S. 858, containing the specific proposals which I recommended in that speech insofar as the Wagner Act was concerned. I am very pleased that in the bill which we are reporting today practically all of the provisions of S. 858 are contained in it plus some refinements of S. 858 which I have developed on the issues since my speech on March 10, 1947." (*Legislative History,* pages 1000-1001.)

S. 858 provided that jurisdictional disputes be dealt with by arbitration.

Sections 8(b)(4)(D) and 10(k) of S. 1126 provided as follows:

> Sec. 8(b)(4)(D): "It shall be an unfair labor practice for a labor organization or its agents——
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> * * * * * * *
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment * * * (D) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks * * *" (*Legislative History,* pages 112-114.)
>
> Sec. 10(k): "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator

appointed by the Board *or upon such voluntary adjustment of the dispute,* such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board." (Italics supplied.) (*Legislative History,* pages 130-131.)

Senate Report No. 105 on S. 1126 explained these sections as follows:

> "Jurisdictional disputes that constitute unfair labor practices within the meaning of section 8(b)(4)(D) may be heard by the Board or an arbitrator unless within 10 days the parties satisfy the Board that *they have adjusted the dispute or agreed to methods for adjusting it.* If the parties comply with the determination of the Board or the arbitrator appointed by it, *or voluntarily adjust the dispute,* the Board shall dismiss the charge. Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also will permit the Board to seek enforcement of the award without further proceedings." (Italics supplied.) (*Legislative History,* page 433.)

When the conference of the two houses had met, considered the differing versions of the bills they had initially passed, and then reported to their respective houses the bill which subsequently became the Act, House Conference Report No. 510 on H.R. 3020 had this to say with respect to the version finally adopted:

> "The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between

> unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bargaining agent *the organization that the Board determines has jurisdiction,* and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (Italics supplied.) (*Legislative History,* page 561.)

This legislative history establishes that the view of the Senate concerning the best method with which to deal with jurisdictional disputes prevailed, and that the bill as finally enacted embodied a basic distinction between such disputes and secondary boycotts, concerning which no procedure analogous to that of Sec. 10(k) was included. The emphasis with respect to jurisdictional disputes was on a settlement of the dispute on its merits. Should the parties themselves fail to settle the dispute, the determination of the dispute was left with the Board. It was only when the parties to the dispute failed to comply with the determination of the Board that concerted activities of labor organizations in connection with such a dispute were to become unfair.

This consideration of the legislative history of the sections of the Labor Relations Act relating to jurisdictional disputes and of the Board's decisions construing such sections demonstrates conclusively that a Sec. 10(k) determination of the Board, and a noncompliance therewith, is a jurisdictional prerequisite

to a finding by the Board that conduct has been unfair under Sec. 8(b)(4)(D). In view of what has already been said concerning the identity of meaning between Sec. 8(b)(4)(D) of the Labor Relations Act and Sec. 303(a)(4) of the Act, it follows that a Sec. 10(k) determination is also a necessary jurisdictional prerequisite to the maintenance of an action under Sec. 303(a)(4).

It has been shown thus far that since the language of Sec. 303(a)(4) must be construed in the light of the meaning of Sec. 8(b)(4)(D), there can be no cause of action under the former section until there has been a determination by the Board under Sec. 10(k). But it might be argued that the language of Sec. 303(a)(4) makes no mention of a prior Board determination under Sec. 10(k), and hence that it should be interpreted standing alone. It might be claimed that thus interpreted, all that would be required to establish a cause of action under this section would be proof that a labor organization had picketed an employer for the purpose of forcing him to assign particular work to employees whom it represented, rather than to other employees, and that at the time of such picketing the employer was not failing to conform to a Board certification following an election to determine a collective bargaining representative. Under such a view it would be immaterial whether or not the Board had ever made a determination of the dispute under Sec. 10(k), and, if it had, it would be immaterial when such a determination was handed down, and whether or not it had been complied with.

It is submitted that such an interpretation of Sec. 303(a)(4) is untenable. It would, in the first place, fly in the face of the Congressional intent already mentioned[17] to make unlawful under Sec. 303(a)(4) only such conduct as is made unfair by Sec. 8(b)(4)(D). Secondly, and equally important, it would make the provisions of the Act and the Labor Relations Act dealing with jurisdictional disputes inconsistent with each other and wholly unworkable. Specifically, it would lead to the following results, among others:

(a) A Board determination could be made under Sec. 10(k) that the employees represented by one union, rather than the employees represented by another, were entitled to perform particular work for an employer. Such a determination would not depend on a prior certification of the union whose rights to the work were upheld. It could be based on such criteria as the "custom in the trade and in the area, the constitutions and peace treaties of the contending labor organizations themselves, the technological evolution of the disputed tasks, and [the] like * * *",[18] or on the construction of collective bargaining agreements held by rival unions with the same employer.[19] If the employer refused to abide by the Board's determination, the union's only effec-

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[17]See the remarks of Representative Lesinski, quoted at page 37, *supra*.

[18]All of which are mentioned as guides to the Board in *Juneau Spruce Corp.*, 82 NLRB 650 (1949), dissenting opinion of Member Murdock, at footnote 21.

[19]This was the chief basis for the Board's determination in *Winslow Bros. and Smith Co.*, 90 NLRB No. 188 (1950).

tive recourse would be to picket his premises to require him to abide by it. It could not file an unfair labor practice charge against him, for an employer's refusal to abide by a Sec. 10(k) determination of the Board is not made an employer unfair labor practice. Yet, despite the fact that picketing to enforce a Sec. 10(k) certification is not an unfair labor practice, if the interpretation of Sec. 303(a)(4) which is under discussion were followed, the employer could sue and collect damages from a union so picketing.

(b) An employer could re-assign work done by employees represented by one labor organization to the employees represented by another, without any justification therefor. In such a case, the Board might find that the first group of employees were rightfully entitled to continue to perform the particular work. Especially would this be the case if the labor organizations themselves, by a jurisdictional pact, had previously agreed to the division of work originally existing. The first labor organization, or both of them, might picket the employer to correct the inequitable situation. The employer could prevent a final Board determination enforceable in the courts by the simple expedient of refusing to file charges under Sec. 8(b)(4)(D) against either labor organization. Instead, under this view of Sec. 303(a)(4), he could sue either or both for damages, and prevail. He would thus be rewarded for creating the very obstruction to commerce which the Act is designed to prevent.

That Congress did not intend such results to flow from Sec. 303(a)(4) is manifest. The section was not created to nullify the results to be achieved by the Board under Sec. 10(k). It was designed to implement the remedies available to employers against unions which persisted in seeking particular work for employees they represented *after an adverse Board determination under Sec. 10(k).* Conversely, it could hardly have been intended to create a cause of action on behalf of employers who themselves refused to abide by a Board determination under Sec. 10(k), or *who refused to avail themselves of the machinery of the Board* which Congress intended was to be employed in the first instance in order to achieve a determination of the dispute binding on all the parties.

Once it is seen that there must be non-compliance with the Board's determination of the dispute before conduct becomes actionable under Sec. 303(a)(4), it becomes clear that the trial court erred in finding that it had jurisdiction to proceed upon appellee's complaint. The complaint failed to allege that a determination of the Board under Sec. 10(k) adverse to the appellants had been made, such a determination was not considered by the court as an essential element of appellee's cause of action (Instruction No. 5, T.R. 50-51), and none was proved to have taken place before April 10, 1948, the day from which appellee claimed damages.[20] It is plain, then, that

[20]The determination of the Board, which was introduced in evidence as Appellee's Exhibit 20, was issued by the Board on *April 1, 1949,* and involved only Local 16 and *not the International.* It was introduced for the limited purpose of showing that Local 16 had not been certified by the Board as the bargaining representative of any of the employees at appellee's mill in Juneau. (T.R. 793, 1056.)

whether it be considered for lack of jurisdiction, or for failure of the complaint to state a cause of action, the judgment which awarded appellee damages for conduct that long preceded the Board's determination under Sec. 10(k) was erroneous, and should be reversed.

B. THE DOCTRINE OF PRIMARY JURISDICTION COMPELS THIS CONCLUSION.

There is one further ground upon which the jurisdiction of the trial court to proceed in a Sec. 303(a)(4) case could arguably be upheld, in the absence of allegations that the Board had determined the controversy in a Sec. 10(k) proceeding. It could be asserted that the provisions of Sec. 303(b), giving the court jurisdiction to entertain a cause of action for damages for conduct covered by Sec. 303(a)(4), invest the court with jurisdiction concurrent with that of the Board to make a determination of the dispute. Thus, it might be contended, in such an action, the court could first decide whether or not the defendant labor organization was entitled to have the employees it represented perform the work in question. If this determination was adverse to the defendant, the court could then decide whether the labor organization had in fact engaged in the concerted activities for the object prohibited by the statute, and what damages, if any, proximately resulted therefrom.

The short answer to such a position is that even if it were tenable, it was not the theory upon which the court below tried this case. None of its instructions gave the jury the task of determining whether the employees that Local 16 represented were entitled

to perform the work of loading appellee's barges. Nor did the trial court rule as a matter of law that the longshoremen represented by Local 16 were not so entitled. It made no such ruling because it did not conceive it an issue in the case. It thus is apparent that the judgment is erroneous, even if it be conceded, *arguendo,* that this meaning of Secs. 303(a)(4) and 303(b) is the correct one.

Moreover, an examination of this view on its merits demonstrates that it is incorrect. The principle of statutory construction which makes this manifest is the doctrine of primary jurisdiction. That doctrine was first enunciated by the Supreme Court in the case of *Texas and Pacific Railway v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). It provides that when concurrent administrative and judicial jurisdiction for the redress of asserted statutory wrongdoing exists, the courts shall have no jurisdiction to proceed until the agency has acted in the first instance, and has made its preliminary administrative determination concerning the character of the complained of conduct. The doctrine, evolved to preserve the power of the Interstate Commerce Commission to establish a comprehensive, non-discriminatory and just scheme of regulation over the nation's railroads, has equal application to the power of the National Labor Relations Board to establish uniform criteria for the resolution of jurisdictional disputes tending to burden interstate commerce.

An examination of the *Abilene* case will illuminate the meaning of the doctrine, the reasons for its enunciation by the Supreme Court of the United States,

and show its clear applicability here. The case involved a suit by an oil company against a railroad to recover charges in excess of what were just and reasonable rates for hauling performed by the latter for the former. The action was based on the shipper's right at common law to recover such excesses. The Interstate Commerce Act had preserved this common law right to shippers in Sec. 22 thereof, which provided:

> "* * * [N]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies * * *" (49 USCA Sec. 22.)

In addition, Sec. 9 of that Act provided:

> "Any person * * * claiming to be damaged by any common carrier subject to the provisions of this Act, may either make complaint to the Commission * * * or may bring suit in his * * * own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person * * * shall not have the right to pursue both of said remedies * * *" (49 USCA Sec. 9.)

In the face of a clear common law right to maintain the action, which had been preserved by Sec. 22 of the Act, the Supreme Court reversed a judgment in the lower court for the plaintiff, holding that the lower court had no jurisdiction of the action. It stated that:

> "* * * [A] shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to regulate commerce—primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable * * *" (204 U.S. 426, at 448.)

The court advanced cogent reasons for its decision. Were courts, and necessarily juries, to be permitted to determine reasonableness of rates, the very purposes for which the Interstate Commerce Commission was created would be frustrated, and the manifest advantage of administrative determination of rates destroyed. The Congress had established the Commission in the first instance in order that uniform and fair rates throughout the nation could be achieved, based on the special skills and techniques unique to the administrative process. If courts, and juries, could make determinations of reasonableness on a case by case basis, the legislative purpose would be completely nullified.

If courts, and necessarily juries, were permitted, in actions under Sec. 303(a)(4) of the Act, to make a determination concerning whether or not the labor organization being sued had a right to the work in question, similar evils would flow under this Act. The uniformity of criteria and the specialized techniques which are available to the Board would be absent when the determination took place in court. A labor organization which the Board had held had a right

to the work in question, and which had properly pursued this determination of the Board in the face of an employer refusal to accept it, could not rely on the Board's determination, for a jury might differ with the Board on the organization properly entitled to the work. Different juries in different parts of the country might arrive at totally opposite conclusions concerning a jurisdictional dispute which was nation-wide in scope, and thus nullify a determination of the Board which was entitled to and had been given nation-wide effect. The Congressional purposes in giving the Board authority uniformly and effectively to settle jurisdictional disputes would be completely subverted.

The rule of primary jurisdiction established by the Supreme Court in the *Abilene* case has been consistently followed in cases under the Interstate Commerce Act.[21]

The general applicability of the rule has been demonstrated in cases arising under the Natural Gas Act,[22] the Railway Labor Act,[23] and the Packers and

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[21]*Baltimore & O. R.R. v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 (1910); *United States v. Pacific & Artic Co.*, 228 U.S. 87 (1913); *Morrisdale Coal Co. v. Pennsylvania R.R.*, 230 U.S. 304 (1913); *Texas & Pac. Ry. v. American Tie Co.*, 234 U.S. 138 (1914); *Northern Pac. Ry. v. Solum*, 247 U.S. 477 (1918); *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456 (1924); *Western & A. R.R. v. Public Service Commission*, 267 U.S. 493 (1925); *Midland Valley R.R. v. Barkley*, 276 U.S. 482 (1928); *Bd. of Railroad Commissioners v. Great N. Ry.*, 281 U.S. 412 (1930); *St. Louis, B. & M. Ry. v. Brownsville Nav. Dist.*, 304 U.S. 295 (1938); *Armour & Co. v. Alton R.R.*, 312 U.S. 195 (1941).

[22]*Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6 Cir., 1949).

[23]*Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

Stockyards Act.[24] *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946), is particularly illuminating on the application of the doctrine to a statute giving an administrative agency power to adjudicate a jurisdictional dispute. Here, also, to use the language of the Supreme Court in that case, Congress has "designated an agency particularly competent to handle the basic question * * * involved." *(Ibid.,* at 566.)

In these cases, the courts held that the preliminary determination of the administrative agency is a jurisdictional prerequisite to court action, even though by the terms of the statute expressly, or by its terms taken in connection with common law remedies, there appears to be full concurrent jurisdiction to proceed in both bodies. These authorities make it plain that the judgment of the court below cannot be supported on any theory of the meaning of Sec. 303 of the Act. For even if it be claimed that the jury in the trial court did determine the dispute adversely to Local 16 in its consideration of the case,[25] the doctrine of primary jurisdiction proves that the court below, and the jury, had no right to make such a determination. The statute requires that this be done by the Board in the first instance. As has already been explained, *supra*, page 51, the infirmity in the judgment below was not corrected because the Board finally issued its determination on April 1, 1949. Accordingly, the judgment must be reversed.

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[24] *Sullivan v. Union Stockyards Co.*, 26 F.2d 60 (8 Cir., 1928).

[25] As has been indicated, *supra*, page 52, this question was not even submitted to the jury.

II.

THE TRIAL COURT ERRED IN HOLDING THAT THE DISTRICT COURT FOR THE TERRITORY OF ALASKA IS A DISTRICT COURT OF THE UNITED STATES, AND PREJUDICIAL ERROR TO APPELLANTS RESULTED THEREFROM.

Sec. 303(b) of the Act provides that persons injured in their business or property by reason of alleged violations of Sec. 303(a) thereof may sue therefor "in any District Court of the United States subject to the limitations and provisions of Sec. 301 hereof without respect to the amount at controversy, or in any other court having jurisdiction of the parties * * *"

The trial court proceeded on the assumption that it was a "District Court of the United States". This is manifest from its order denying International's motion to quash service (T.R. 14, 21-22), from its order overruling appellants' demurrer (T.R. 21-22), from the opinion it delivered in connection with the said order (83 F. Supp. 224), and from the instructions it gave to the jury on the question of agency (T.R. 49). This erroneous assumption of a status it did not have, led the trial court into serious error. Before considering the extent of the error, we shall demonstrate that the trial court was not a "District Court of the United States."

A. THE DISTRICT COURT FOR THE TERRITORY OF ALASKA IS NOT A DISTRICT COURT OF THE UNITED STATES.

The phrase "District Court of the United States" having for many years had a clear, precise and well-settled meaning (Cf. *International etc. v. Wirtz,* 170 F.(2d) 183 [1948]), the court must presume the Con-

gress intended that meaning in 1947 when it used that phrase in the Act. (*Old Colony etc. v. Commissioner*, 284 U.S. 552 [1932]; *Deputy v. DuPont*, 308 U.S. 488 [1940]; *United States v. Stewart*, 311 U.S. 60 [1940]; *Shapiro v. United States*, 335 U.S. 1 [1948].)

The meaning which the phrase in question had received by 1947 excluded from its scope the District Courts for the territories, including the District Court for the Territory of Alaska.

In *Mookini v. United States*, 303 U.S. 201 (1938), the Supreme Court considered the status of the District Court of the Territory of Hawaii (a court in many respects analogous at that time in its creation and jurisdiction to the District Court for the Territory of Alaska). The precise problem in the *Mookini* case was whether or not the Criminal Appeals Rules which had been promulgated pursuant to the Act of March 8, 1934, 48 Stat. 399, applied to the District Court for the Territory of Hawaii. The rules themselves provided that they were applicable to "District Courts of the United States". The Supreme Court held that the District Court for the Territory of Hawaii was not a District Court of the United States within the meaning of the rules.

> "The term 'District Courts of the United States' as used in the rules, without an addition expressing a wider connotation, has its historical significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the territories are legislative courts, properly speaking, and are not District Courts of the

> United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States'. Reynolds v. United States, 98 U.S. 145; In re Mills, 135 U.S. 263; McAllister v. United States, 141 U.S. 174; Stephens v. Cherokee Nation, 174 U.S. 445; Summers v. United States, 231 U.S. 92; United States v. Burroughs, 289 U.S. 159." (303 U.S. 201, at 205.)

This decision was applied to the District Court of the Panama Canal Zone in *Schackow v. Canal Zone,* 104 F.(2d) 681 (1939), and was substantially followed as far as the District Court of Puerto Rico is concerned in *Puerto Rico etc. v. Colom,* 106 F.(2d) 345 (1939). See, also, *Balzac v. Porto Rico,* 258 U.S. 298 (1922).

The cases directly involving the District Court for the Territory of Alaska indicate a similar result.

The first case on the question of the nature of the court in Alaska is *McAllister v. United States,* 141 U.S. 174 (1891). This case arose on the petition of McAllister, who had been appointed a judge of the District Court for the Territory of Alaska, to recover his wages after his removal from office by the President. He relied upon Rev. Stat. 1768 which provided that judges of the "courts of the United States" could not be so removed. The Supreme Court held that the District Court for the Territory of Alaska, although it had the same jurisdiction as the District Courts of the United States, was not a "court of the United States" within the meaning of the revised statute in

question, and consequently the claim for the payment of salary was denied.

To the same effect with respect to the Alaska court, see *In re Cooper,* 143 U.S. 472 (1892); and *Coquitlam v. United States,* 163 U.S. 346 (1896).

Carscadden v. Territory of Alaska, 105 F.(2d) 377 (9 Cir., 1939), followed these earlier decisions and held that the District Court for the Territory of Alaska was not a constitutional court, thereby enabling this Court to exercise its independent judgment on appeals from the Alaska court.

As we have said, Congress is presumed to have known in 1947 when it enacted Sec. 303(b) of the Taft-Hartley law, that by using the phrase "District Court of the United States", it was using a term which had the definite and fixed judicial meaning described above. This meaning excluded from the purview of the phrase used the District Court for the Territory of Alaska as well as certain other territorial courts. As a matter of fact, it is probable that Congressional realization that the phrase "District Court of the United States" did not embrace the territorial courts was one of the factors which gave rise to the conferring in Sec. 303(b) of jurisdiction upon "any other court having jurisdiction of the parties." Thus in those territories where there was not a "District Court of the United States," the remedies provided by 303 could be enforced in the territorial courts of general jurisdiction.[25a]

[25a]However, as we will indicate below, there are substantial differences with respect both to procedure and substance depending on the court in which the action is brought.

There are many examples from Congressional legislation which demonstrate that over the years Congress has been aware of the distinction between courts in the territories and those which may truly be denominated "District Courts of the United States." An example will suffice to make the point here.

In 1946, just one year before it enacted the statute here in question, when Congress desired to apply the Federal Rules of Criminal Procedure to the courts in the territories, it specifically so stated. In 18 U.S.C.A. [old] 687, it provided that the Supreme Court should have the power to prescribe rules of criminal procedure "in District Courts of the United States, including District Courts of Alaska, Hawaii, etc., etc." And Rule 54(a)(1) of the Federal Rules of Criminal Procedure specifically provided that the Rules applied to all criminal proceedings "in the District Courts of the United States, which include the District Courts of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, etc., etc."

With this statutory and case background, it is perfectly apparent that had Congress intended the trial court to have jurisdiction over suits brought under Sec. 303 of the Act as a District Court of the United States, it would not have used the phrase "any District Court of the United States" without more. On the contrary, it would have said, as it did in the other situations referred to above, "any District Court of the United States, including the District Court for the Territory of Alaska, etc., etc."

The failure to make a specific reference to the District Court for the Territory of Alaska can only mean, in view of the foregoing, that Congress did not intend that court to have jurisdiction of suits brought under Sec. 303 as a District Court of the United States.

Perhaps the most definitive illustration of this point is to be found in the new Judicial Code adopted in 1948 just one year after the passage of the Taft-Hartley Act. There Congress had an opportunity most carefully to review the entire judicial structure of the United States and to define what it meant by the terms which had been used in the legislation and court decisions throughout the years. Clearly, by the adoption of the new Title 28, Congress did not intend, except where it specifically so stated, to create any new or different law from that which had previously obtained, but intended only to revise, recodify and clarify a pre-existing law concerning the judiciary of the United States.

Chapter 5 of Title 28 is captioned: "District Courts". Sections 81 through 131 contained in Chapter 5 create the judicial districts of the United States. In addition to the judicial districts within the continental limits of the United States (i.e., in the forty-eight states), judicial districts are there created for the District of Columbia (28 U.S.C. 88), Hawaii (28 U.S.C. 91), and Puerto Rico (28 U.S.C. 119). No judicial district is created for Alaska.

Section 132 of Title 28 provides:

> "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district."

Since there is no judicial district created for Alaska, the court in Alaska cannot be a District Court of the United States within the meaning of Sec. 132 of Title 28.

Section 451 of Title 28 defines the phrase with which we are here concerned, i.e., "District Court of the United States", as "the courts constituted by Chapter 5 of this title." This obviously does not include the District Court for the Territory of Alaska. Similarly, 28 U.S.C. 610, in defining the broader term "courts", distinguishes between "District Courts of the United States" on the one hand, and "the District Court for the Territory of Alaska" and certain other territorial courts, on the other.

The revisers of the Judicial Code expressly recognized what they were doing with respect to the District Courts in the District of Columbia, Hawaii and Puerto Rico.

The Reviser's Note to Sec. 88, *supra,* which created the judicial district for the District of Columbia, says:

> "This section *expressly* makes the District of Columbia a judicial district of the United States."

The Reviser's Note to Secs. 1291 and 1292 states:

> "The District Courts for the districts of Hawaii and Puerto Rico are embraced in the term 'District Courts of the United States' (see definitive section 451 of this title)."

The Supreme Court has relied upon these very Reviser's Notes to assist it in determining the nature of the District Court in Hawaii (*Stainback v. Mo*

Hock Ke Lok Po, 336 U.S. 368 (1949), at 376, Footnote 12) and has indicated that the Alaska Court stands on a different footing (*ibid.,* at 376, Footnote 11).

Furthermore, the Reviser's Notes state that 28 U.S.C. 91, dealing with Hawaii, is based upon Secs. 641 and 642(a) of Title 48 U.S.C. and that 28 U.S.C. 119, dealing with Puerto Rico, is based upon Secs. 863 and 864 of Title 48 U.S.C. These sections of 48 U.S.C. which had to do with the Courts in Hawaii and Puerto Rico were incorporated into the new Title 28 in 1948 and were for that reason repealed by Sec. 39 of the Act of June 25, 1948, Chapter 646, which enacted the new Judicial Code.[26]

However, those provisions of Title 48 which have to do with the District Court for the Territory of Alaska (48 U.S.C.A. 101, *et seq.*), the Courts in the Canal Zone (48 U.S.C.A. 1344 *et seq.*), and the Courts in the Virgin Islands (48 U.S.C.A. 1405, *et seq.*), have not been repealed since they were not placed in the new Judicial Code as were the analogous sections dealing with the District of Columbia, Hawaii and Puerto Rico.

In adopting the new Judicial Code, Congress did not overlook the Courts in Alaska, the Canal Zone or the Virgin Islands by inadvertence. The Judicial Code—i.e., Title 28—is, technically speaking, Sec. 1 of the Act of June 25, 1948, Chapter 646. Sections 9 to 13 *of that act* (not of Title 28) are amendments in vari-

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[26]See pages 1668 and 1663, respectively, of the paper-bound (1948) edition of Title 28.

ous particulars of sections of 48 U.S.C. dealing with the District Court for the Territory of Alaska; similarly, Sec. 31 of that act is an amendment to the Canal Zone code (48 U.S.C. 1353) dealing with the Court in the Canal Zone; and Secs. 28 and 30 of that act are amendments to sections of 48 U.S.C. dealing with the Court in the Virgin Islands.

Thus it is clear that in 1948, only one year after the passage of the Taft-Hartley Act, while Congress in enacting the Judicial Code changed the prior status of the District Courts for the District of Columbia, the Territory of Hawaii, and Puerto Rico, and made them "District Courts of the United States", it deliberately did not make such a change in the status of the District Courts for the Territory of Alaska, the Canal Zone, or the Virgin Islands.[27]

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[27]Other evidence that Congress recognized that the Alaska Court occupied a different status from that of a "District Court of the United States" is to be found in the following Reviser's Notes to Title 28:

(a) Secs. 501, 502, 504 which deal with United States attorneys:

> "Words 'including the District of Columbia' were omitted, because the District of Columbia is made a judicial district by section 88 of this title." (501)
>
> "The exception of Alaska * * * was omitted as covered by section 109 of Title 48, U.S.C., 1940 ed., Territories and Insular possessions * * *" (502)
>
> "Reference to the territories * * * was also omitted as covered by the provisions of Title 48, U.S.C., 1940 ed., Territories and Insular possessions. See sections 109 and 112 of such title applicable to United States attorney in Alaska, and 1353 applicable in the Canal Zone, and 1405y applicable in the Virgin Islands." (504)

(b) Secs. 541, 542, 545 which deal with United States marshals, and contain substantially the same provisions as those just referred to.

(c) Secs. 631 and 633 which deal with United States Commissioners:

> "This revised section by its terms limits the section and Chapter 43 of this title to commissioners appointed by a 'district

Why Congress chose to leave the Alaska Court in the same status as the Courts in the Canal Zone and the Virgin Islands is a question that we cannot an-

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court' which includes the courts enumerated in chapter 5 of this title but not those of Alaska, Canal Zone or Virgin Islands.'' (631)

''The words 'in each judicial district' limit the section to the commissioners in the districts enumerated in chapter 5 which includes Hawaii, Puerto Rico and District of Columbia but omits Alaska, Canal Zone, and Virgin Islands.'' (633)

(d) Sec. 751 which deals with District Court clerks:

''Provision for similar offices in Alaska, Canal Zone, and the Virgin Islands is made by sections 106, 1349 and 1405y, respectively, of Title 48, U.S.C., 1940 ed.''

See also 28 U.S.C. 753 where, when Congress wanted to have the courts in the territories as well as the district courts appoint court reporters, it provided as follows:

''(a) Each district court of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall appoint one or more court reporters.''

Compare the Reviser's Note to the foregoing section with the Reviser's Notes heretofore referred to.

Finally, see the Senate Report on Title 28—i.e., Senate Report 1559, 80th Congress, 2d Session—wherein is discussed an amendment to the House version of Title 28 with respect to jurisdiction over suits against the United States. In the House version the section which is now 28 U.S.C. 1346(b) gave such jurisdiction to ''district courts *including the district courts for the Territories and Possessions of the United States.*'' The Senate struck out the italicized words and amended the phrase to give jurisdiction to ''the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands.''

In explaining this amendment the Senate Report stated that it was necessary to conform the section taken from the Tort Claims Act to the revision in which the courts in at least two territories or possessions—Hawaii and Puerto Rico—are included, by virtue of 28 U.S.C. 451, in the term ''district court''.

''The district courts for Hawaii and Puerto Rico therefore need not be specifically referred to. On the other hand in at least one of the possessions there are local district courts which are not intended to have tort-claim jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining territories and possessions thus makes for clarity and precision.''

See pages 1680-1681 of the paper-bound (1948) edition of Title 28.

swer. But the fact is crystal clear from an examination of the legislation that that is exactly what Congress did. The wisdom or lack of wisdom in making these clarifications and in grouping the Alaska Court with the Courts of the other two territories, while giving a full-fledged District Court status to the Courts in Hawaii, the District of Columbia, and Puerto Rico, is something for Congress to determine.

It is not for this or any other Court to modify or change the status or nature of the Alaska Court (*Bate Refrigerating Co. v. Sulzberger,* 157 U.S. 1 [1895]; *Commissioner v. Gottlieb,* 265 U.S. 310 [1924]; *Kalb v. Feuerstein,* 308 U.S. 433 [1940]; *United States v. Cooper Corp.,* 312 U.S. 600 [1941]), which the foregoing shows was not a District Court of the United States in 1947 when the Taft-Hartley Act was passed, and which is not such a court today. There can be no question whatsoever that the District Court for the Territory of Alaska never was, and is not now, a "District Court of the United States", within the meaning of Sec. 303 of the Act.

Neither of the two main grounds relied upon by the trial court to justify its contrary conclusion (83 F. Supp. 224, 226) is tenable.

In the first place, while the trial court recognized that the phrase "District Court of the United States" without more does not mean the territorial courts, and while it cited this Court's decision in *International Longshoremen's, etc. v. Wirtz,* 170 F. (2d) 183 (9 Cir., 1948), (See, 83 F. Supp. 224 at 225), it suggested that to apply this definition here would lead to difficulties in the enforcement of the statute in other re-

spects (ibid. at 226). It said, for example, that the power of the Board to apply for injunctive relief under Sec. 10(1) of the Labor Relations Act[28] or to seek enforcement of an order while the Circuit Court is in vacation, under Sec. 10(e),[29] might be hindered or embarrassed by applying the definition of the phrase required by the authorities. The difficulty with this argument, assuming it is applicable to the case at bar, is that it calls upon the judiciary to correct supposed gaps left, or errors made, by the legislature. This, of course, is not a judicial function. If the application of the proper definition of the phrase used in the Act leads to the difficulty suggested, the remedy, of course, is to apply to the legislature for redress.

In *Bate Refrigerating Co. v. Sulzberger, supra,* the Supreme Court said:

> " 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' Denn v. Reid, 10 Pet. 524, 527." (157 U.S. 1, at 37.)

In *United States v. Cooper Corp., supra,* the same Court said:

> "But it is not our function to engraft on a statute additions which we think the legislature logically

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[28]This section is found in Title I of the Act and not in Title III, wherein is contained Sec. 303. See Note 1, *supra.*

[29]This section is also found in Title I.

might or should have made." (312 U.S. 600, at 605.)

In the second place, the trial Court was concerned lest the definition urged upon it would preclude the appellee or persons similarly situated from any relief whatsoever. (See, 83 F. Supp. 224 at 226. It apparently feared that if it applied the correct definition and held that it was not a District Court of the United States, the suit would have had to be dismissed and that no relief could have been obtained in Alaska (and presumably in other territories if the suit arose there). Again, if true, that is a matter properly to be addressed to the Congress and not to be remedied by judicial tampering with the legislation. However, Sec. 303(b) gives jurisdiction not only to District Courts of the United States but also to any other court having jurisdiction of the parties, and clearly the Alaska Court,[30] assuming it had jurisdiction of the parties, could have proceeded with the suit on the basis of the latter proviso.[31]

It is not unusual for Congress to create a cause of action and place its enforcement in different forums where different rules of procedure as well as substantive law may apply. Examples come readily to mind. A seaman may elect to sue under the Jones Act[32] in the state or federal court,[33] and if in the latter, either

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[30]Cf. *Coquitlam v. United States, supra.*

[31]In such a case, however, there would be a substantial difference in both the substantive law applicable and the procedure to be followed, as we shall point out below.

[32]46 U.S.C.A. 688.

[33]*O'Donnell v. Great Lakes, etc.*, 318 U.S. 36 (1943); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Engel v. Davenport*, 271 U.S. 33 (1926).

at law or in admiralty,[34] and depending upon his election, different rules of procedure will govern his cause.[35] Damage actions for violations of price and rent control statutes[36] also may be brought in either forum and different rules are applicable.

So, here, the action may have been maintained in the trial court not as in a District Court of the United States—for it was not that—but as in any other court having jurisdiction over the parties—assuming it did have such jurisdiction. Thus the fear that appellee would have had no forum within which to maintain its suit is not well-founded, since the trial court is the court of general jurisdiction for the Territory of Alaska. (48 U.S.C. 101.)

The trial court's disregard of its own status and its effort to make itself into a District Court of the United States, which it clearly was not, resulted in its application to this case, to appellants' extreme prejudice, of rules concerning jurisdiction, service and agency which should never have been applied here.

B. AS A RESULT OF MISCONCEIVING ITS STATUS, THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANTS CONCERNING MATTERS OF JURISDICTION, SERVICE AND AGENCY.

The foregoing has demonstrated, we think, beyond any question that the trial court is not a District Court of the United States. The trial court's error in this regard was not a mere abstract or academic one but resulted in serious prejudice to the appellants.

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[34] *Rogosich v. Union Drydock & Repair Co.*, 67 F.2d 377 (3 Cir., 1933).

[35] *Pacific SS Co. v. Peterson*, 278 U.S. 130 (1928).

[36] 50 U.S.C.A. App. 925(c), *et seq.*

Since the trial court was not a District Court of the United States, it is clear that the limitations and provisions of Sec. 301 of the Act were not applicable to this cause. This conclusion is impelled by a reading of Sec. 303(b), which provides that suits under Sec. 303(a) may be maintained either in the District Courts of the United States or in any other court having jurisdiction of the parties. It is only in connection with the first group of courts—i.e., District Courts of the United States—that the statute makes the limitations and provisions of Sec. 301 applicable.[37]

The limitations and provisions we discuss directly below. In effect, they gave "District Courts of the United States" broader jurisdiction over non-resident labor unions, made service of the process of such courts upon non-resident unions easier, and authorized broader concepts of agency in such courts, than would otherwise obtain. But since the trial court was not such a court, it had jurisdiction over the International only by virtue of either the common law or the statutory law of Alaska. Similarly, if service was properly effected upon the International, it was so effected only by virtue of the common law or the statutory law of Alaska. And finally, the agency relationships between the International and Local 16, and between the alleged officers of these organizations and their alleged principals, had to be determined by the common law or the statutory law of Alaska.

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[37]Sec. 303(b) reads:

"* * * *in any District Court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount at controversy, or* in any court having jurisdiction of the parties * * *" (Italics supplied.)

In each instance, however, the trial court applied the provisions of Sec. 301 and in each instance those provisions were detrimental to the appellants. On each issue the common law or the Alaska law was more favorable to appellants.[38]

The limitations and provisions of Sec. 301 which the court applied are substantially as follows: Sec. 301(b) provides that a labor organization shall be bound by the acts of its agents, *and that it may be sued as an entity.* Sec. 301(c) provides that the District Courts of the United States shall have jurisdiction over labor organizations in the district in which *they maintain their principal office,* or in any district in which *their duly authorized agents* are engaged in representing employee members. Sec. 301(d) provides that the service of process upon an officer or *agent* shall constitute service upon the labor organization. Sec. 301(e) provides that in determining whether any person is acting as an agent, *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*

Even superficial examination of the provisions of Sec. 301 indicates how broadly they have extended the

[38]That the extension of jurisdiction over non-resident associations, the greater ease of service thereon, and the broader scope of agency doctrine was limited by Congress to cases in United States District Courts and not extended to "other courts", gives appellee no cause for complaint. It may well be that Congress, recognizing that such extensions were novel and opened the door to grave abuses to the detriment of trade unions, decided that it did not want to permit the extended doctrines to be applied and administered by any but judges of the United States District Courts—judges in whose competence and ability Congress presumably had greater faith than it might have had in judges of "any other court", since it had more knowledge of those men than of other judges.

rules with respect to jurisdiction, service and agency. A comparison of those provisions with the common law or Alaska statutes on the subject demonstrates that in this particular case the error committed by the trial court was very significant.

1. As to jurisdiction.

As we have seen, the trial court assumed jurisdiction over the appellant International despite the fact that it maintained no office in Alaska and that its principal place of business was in California, upon the ground that it had an "International Representative" employed by it in Alaska who was there representing its employee members. This assumption of jurisdiction was clearly based upon Sec. 301(c) and upon nothing else. Since, as we have shown, Sec. 301(c) does not apply, the trial court had no jurisdiction over the International.

The attempt of the trial court to assert jurisdiction over the International which was (as to it) a non-resident, unincorporated association, raises serious constitutional questions as well as those already discussed. In *Flexner v. Farson,* 248 U.S. 289 (1919), the Supreme Court held that a Kentucky statute providing that jurisdiction could be obtained over a foreign partnership or association upon a cause of action arising from business done in the state, by serving the agent of such partnership or association residing in the state, was unconstitutional. The court found that the statute violated the due process clause. This case has been followed by the highest courts of a number of states, all of which invalidated similar

statutes in their own states.[39] The doctrine of the *Flexner* case has been qualified in later cases but the basis of the qualification lies in the nature of the business of the foreign partnership or association over whom jurisdiction is sought to be asserted. In *Doherty & Co. v. Goodman,* 294 U.S. 623 (1935), the Supreme Court upheld the constitutionality of an Iowa statute which provided that a non-resident association *conducting an office* in Iowa could be served by serving an agent employed in such office, *in all matters growing out of or connected with the business of that office,* provided that the business conducted was of a special nature *subject to special regulation by the state.*[40]

The principle which these cases establish is that at common law no foreign association could be subjected to the jurisdiction of a forum simply by service upon an agent doing business within the state. If a specific statute provides for such an assertion of jurisdiction, then such a statute will be upheld if the foreign association maintains an office in the state, if the cause of action arises out of the business of that office, and if

[39] *Woodfin v. Curry,* 228 Ala. 436 (1934); *Andrew Bros. v. McClanchan,* 220 Ky. 504 (1927); *Victor Cornille etc. v. R. G. Dunn & Co.,* 153 La. 1078 (1923); *Knox Bros. v. Wagner & Co.,* 141 Tenn. 348 (1919).

[40] The qualifications which the Supreme Court insisted upon, and which are italicized above, are not present in this case. The International did not conduct an office in Alaska. The action did not grow out of, nor was it connected with, the business of any such office. And, query: Whether the conduct of a labor organization in interstate commerce is subject to special regulation by the Territory of Alaska. We shall point out immediately below that there in fact is no Alaska statute akin to the Iowa statute involved in the *Doherty* case.

the business in question is subject to special regulation by the state.

A thorough perusal of the three volumes of the Alaska Compiled Laws, Annotated (1948), reveals no statute of the territory which authorizes service upon a non-resident association.

As a matter of fact, there is a decision of the Alaska court[41] to the effect that under Alaska law an action cannot be maintained against a partnership as an entity under the Alaska statutes. This suggests that even as to resident unincorporated associations, an action cannot be maintained in Alaska. If that be true, then under the Alaska law, the trial court had no jurisdiction even over Local 16 as an entity.

Accordingly, as to the International, the judgment here must be reversed either because it can be stated at once that Alaska could not have acquired jurisdiction over the person of the International under the cases cited above, or as to both appellants, because the Alaska court failed to rule on whether or not under its law, jurisdiction could have been obtained over both appellants. Its reliance upon Sec. 301(c) in the place of its own law was clearly defective.

2. As to service.

Connected closely with the question just discussed is the question of service. Here, again, the trial court asserted its jurisdiction over the International and

[41] *Burris v. Veterans Alaska Cooperative Co.*, D.C., Territory of Alaska, Division No. 1, unreported.

held that service was properly effected upon it by service upon its alleged "International Representative". The validity of this service was dependent solely upon the provisions of Sec. 301(d) and (e), and this reliance, as we have already pointed out, was not well founded.

In a case decided only several months ago, the United States District Court for the Eastern District of New York granted a motion to vacate service of summons upon an International Union with headquarters in Indiana. In that case process had been served upon the International's president while he was in New York. The organization had neither an officer nor a representative in New York, although there was in that jurisdiction a local of the International. In granting the motion to vacate, the court said:

> "It appears that the defendant's constitution and by-laws require that its principal office be located in Indianapolis, Indiana; that all of its books, records, etc. be kept there; that its funds be deposited in Indianapolis banks and that its officers reside there.
>
> "By reason of the foregoing I find that the defendant is not doing business in New York. Philadelphia and Reading Ry. Co. v. McKibin, 243 U.S. 264, 265; Danega Inc. v. Lincoln Furn. Mfg. Co. Inc., 29 F.2d 164; Amtorg Trading Corp. v. Standard Oil of California, 47 F. Supp. 466."
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> *Daily Review Corporation v. International Typographical Union,* E.D.N.Y. No. 10344, June 20, 1950 (26 L.R.R.M. 2503.)

In the case at bar the constitution of the International (Pl. Exh. 3) and the affidavits of Verne Albright (T.R. 8-14) and Germain Bulcke (T.R. 16-18) demonstrate that the International maintains its principal office and place of business in San Francisco, that all of its books, records, accounts and monies are kept there, and that none of its officers reside in Alaska. Thus the reasoning of the decision in the *International Typographers* case, *supra,* in which case the provisions of Sec. 301 were concededly applicable, compels a similar conclusion here where the broad provisions of Sec. 301 are not applicable. The International's motion to quash service should have been granted.

Since there was no jurisdiction over the International in the first instance, the service upon its alleged "International Representative" could not cure that defect and nothing is cited by the trial court in its opinion on the motion to quash service and on the demurrer (83 F.Supp. 224) which indicates that it is relying in this or any other respect upon Alaska law.

3. **As to agency.**

The error which the trial court fell into concerning the laws of agency stem, as do the other two errors discussed, from its misconception of its own status and consequently its unjustified application to this cause of the provisions of Sec. 301. The error is most pronounced in the instruction to the jury on the question of agency. (T.R. 49.) This instruction is framed entirely upon the theory of Sec. 301(e) and specifi-

cally informs the jury that the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling. Since the evidence fell far short of showing that the International either authorized or subsequently ratified the acts complained of, this instruction was highly prejudicial to the International.[42]

The ordinary rules of agency, of course, require either prior authorization or subsequent ratification. (*Restatement of Agency,* Secs. 1, 15, 26, 82, 140, 212, 215.) In the absence of either, the principal cannot be bound by the acts of his agent. The failure of the trial court to instruct on the theory of the ordinary rules of agency made the International responsible, in the eyes of the jury, for every act which occurred in Alaska, whether the International had any knowledge of it or not, and apart from either authorization or ratification by the International.[43]

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[42]Even if there was some evidence of participation by agents of the International, the question of whether this constituted "authorization" or "ratification" should have gone to the jury as a question of fact (Cf. *United Brotherhood etc. v. United States*, 330 U.S. 395 at 408-409 (1947)), under appropriate common law agency instructions. 2 *Am. Juris.* 349 *et seq.*, and cases there cited.

[43]The trial court was at least obligated to apply to this case the common law doctrine of agency discussed above, since its reliance on Sec. 301(e) was erroneous. It is arguable that the trial court was required to apply an even more stringent standard than the common law requires. Since the trial court, while not a "District Court of the United States" was probably at least a "court of the United States", the provisions of the Norris-LaGuardia Act (29 U.S.C.A. 101, *et seq.*) apply to it. (*Alesna v. Rice*, 69 F. Supp. 897 [1947], later dismissed on other grounds, 74 F. Supp. 865 [1947]; affirmed 172 F.2d 176 [1949]; cert. denied 338 U.S. 814 [1949].) If that is the case, then Sec. 6 of the Norris-LaGuardia Act (29 U.S. C.A. 106) requires that a labor organization shall not be held responsible for the acts of its agents "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Cf. *United Brotherhood etc. v. United States, supra.*)

Since the trial court was not a "District Court of the United States", it erred in applying to this case the provisions of Sec. 301 of the Act. That error led it into an assumption of jurisdiction over the International which it did not have, into an assumption of jurisdiction over Local 16 which it probably did not have, into an acceptance of a purported service of the International which was not a valid service, and finally, into an application to the cause (in its instruction to the jury) of rules of agency which were not applicable and which were highly prejudicial to both the International and Local 16. For each of these reasons, the judgment below must be reversed.

III.

PREJUDICIAL ERROR TO APPELLANTS RESULTED FROM THE TRIAL COURT'S INSTRUCTIONS TO THE JURY.

The remaining portions of this Argument will be concerned with the errors which were committed by the trial court within the framework of its erroneous conception of the nature of appellee's cause of action and its status as a Court. From what follows it will be shown that these errors also require a reversal of the judgment.

(a) Specifications of error 3 (b), (d), (e) and (f).

The trial court charged the jury that before the appellee could recover, it was required to prove: (1) that the appellants, or either of them, engaged in, or

induced or encouraged appellee's employees at Juneau or the employees of other employers to engage in, a concerted refusal in the course of their employment to work on lumber of appellee, or to perform any services for appellee; (2) for the purpose of forcing and requiring the appellee to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned; (3) that such acts, or any of them, if committed by and as the officers or the agents of appellants, or either of them, were within the scope of employment of such officers or agents; and (4) that as a direct and proximate cause thereof, the appellee was damaged. (Instruction No. 5; T.R. 50-51.)

The trial Court presumably recognized that appellants, as labor organizations, could act only through their officers or agents. Hence, in Instructions Nos. 4, 6 and 7, as well as in Instruction No. 5, it charged the jury with the rules to be applied in determining who were agents of the appellants, and whether or not the activities of such agents were chargeable to them. Before these instructions are examined in detail, some discussion is necessary concerning the right of each appellant to be free from liability unless the essential elements of the cause of action were established against it individually.

The appellants here were separate labor organizations. The cases are clear that the relationship between them evidenced by their respective constitutions

(Pl. Exhs. 3 and 4) did not, without more, make Local 16 an agent of the International.

> *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344 (1922);
>
> *Daily Review Corp. v. I.T.U.,* 9 F.R.D. 295, (D.C. E.D. N.Y. 1949);
>
> *Isbrandtsen Co. v. National Marine Engineers Beneficial Ass'n,* 9 F.R.D. 541 (D.C. S.D. N.Y. 1949).

Before either appellant could be held liable, the evidence had to establish that *its* agents engaged in the proscribed activities, and that the acts of such agents were binding upon *it.* It would not be sufficient, in order to hold the International, to show simply that Local 16, through its agents, had engaged in actionable conduct. Proof was required that the International, acting through *its* agents or officers, had committed the wrongful acts.

With this in mind, it becomes apparent that Instructions Nos. 6 and 7 of the trial court were prejudicial to the International. Instruction No. 4, while erroneous in a vital particular already discussed,[43a] gave the jury an otherwise accurate statement of the common law rules of agency.[43b] The court was correct

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[43a]This was the inclusion in the instruction of Sec. 301(e) of the Act, the error of which is discussed at pages 78-79, *supra.* Reference hereafter to Instruction No. 4 will connote a reference only to those portions of the instruction exclusive of the first paragraph.

[43b]Instruction No. 4 also instructed the jury that it was undisputed that the witness Verne Albright and John Barry were, during the time covered by the dispute, officers of the International. This instruction was contrary to the evidence, which established that Albright and Barry were employees, rather than officers of the International. (T.R. 272-274).

in this respect. Congress intended these rules to govern the responsibility of labor organizations for the acts of their agents, in cases under the Act.[44] The trial court, however, did not confine itself to this standard of responsibility. It proceeded, in Instruction No. 6, to give the jury a sweeping definition of conspiracy or joint action between Local 16 and the International upon which the jury could also rely in holding the International responsible. Its effect, as will be seen, was to direct a verdict against the International.

The appellee's case was tried on the theory that the International could not be found liable unless Local 16 was liable. (T.R. 1044-1045.) Its theory could hardly have been otherwise, for the record of events in Juneau showed clearly that the dispute was one between the appellee and Local 16 only. The responsi-

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[44]House Conference Report No. 510, on H.R. 3020, Statement of the Managers on the Part of the House, stated with respect to this question:

> "(12) The conference agreement contains in the definition section a rule to be applied for the purpose of determining when a person is acting as an 'agent' of another person so as to make such other person responsible for his acts. A provision having the same effect was contained in section 12 of the House bill, under which the Norris-LaGuardia Act was made inapplicable in connection with certain activities dealt with in that section. One of the provisions of that act which was thus made inapplicable was section 6 thereof, which provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the 'unlawful' acts of its agents except upon clear proof of actual authorization of the particular acts performed, or subsequent ratification thereof after knowledge. Hence, under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)." (*Legislative History*, page 536.)

bility of the International for the conduct complained of by appellee depended primarily on the interpretation to be placed on the activities of one Verne Albright, who was concededly an employee of the International. (T.R. 272.) Albright first learned of the existence of the dispute between appellee and Local 16 early in May 1948 (T.R. 946), when he was called to Juneau by the Local to assist it in achieving a settlement. While in Juneau, he attended numerous conferences at which he acted as the spokesman for Local 16. (T.R. 948-951.) According to his testimony, his entire participation in the events which took place in Juneau was as a representative and spokesman for Local 16 alone. (T.R. 947.) His affidavit in support of the International's motion to quash service was introduced in evidence by appellee as its Exhibit 19. It stated, among other things, that each local of the International was an autonomous body having complete authority with respect to the commencement or cessation of labor disputes, that the International was not involved in the dispute in Juneau in any manner, and that his participation in the dispute was solely as a representative of Local 16, pursuant to its request. The question of whether Albright had acted solely as the agent of Local 16 in the dispute, or whether as an employee of the International his activities were also imputable to the latter, was thus a crucial issue in the case. It should have been decided by the jury on the basis of the ordinary principles of agency which were included in Instruction No. 4, and other instructions. By giving Instruction No. 6, however, the

trial court made the liability of the International depend not on whether Albright or others had acted as its agents, but on whether the agents of Local 16 had committed unlawful acts. For the instruction permitted the jury to find the International chargeable with the acts of agents of Local 16 by virtue of the mere presence of Albright in Juneau, without any regard whatever to the scope of his authority to bind the International while there. Under the instruction, if the jury found "from a preponderance of the evidence that" Albright and Local 16

> "* * * acted jointly or in pursuance of a common purpose or design, then from [that] time *everything that was done, said or written by any of the officers or agents of* [Local 16 *or the International*] *in furtherance of such* * * * *understanding and to effect the object or purpose thereof, regardless of whether done, said or written in Alaska or elsewhere, is binding on both of the* [*appellants*] *just as though they themselves, through their officers or agents, had done such acts or made such statements, and if the object of the conspiracy was accomplished, resulting in damage, each is liable for the whole thereof regardless of the degree of participation in the commission of the acts charged, or any of them.*" (Instruction No. 6; T.R. 51-52. Italics supplied.)

Since the instruction also stated that "evidence [of] a combination of or cooperation between two or more persons to accomplish *a* common purpose" was "sufficient" to show a "common purpose or design" (italics supplied), the fact that Albright cooperated with the officers of Local 16 in the common purpose

of effecting a settlement of the dispute gave the jury no alternative but to find the International liable for all of the acts of the agents of Local 16.

Similarly, Instruction No. 7 was so broadly stated that Albright's assistance to Local 16 in settling the dispute could have been found by the jury to constitute the "aid" to the latter's acts which, standing alone, was sufficient under the instruction to impose liability on the International "to the same extent as if [it] had performed the act[s] [itself]". (T.R. 53.)

The effect of these instructions was to completely nullify Instruction No. 4 and to foist liability upon the International if the Local were liable, irrespective of its responsibility for the acts of the Local under agency principles. Furthermore, by the Court's supplementary instructions, the jury was directed to return a verdict against Local 16.[45]

It thus becomes evident that the effect of Instructions Nos. 6 and 7 was a directed verdict against the International as well.

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[45]Supplementary Instruction No. 2 stated in part as follows:
"The issues in this case are simple and few. You are instructed that it is uncontradicted that the members of Local 16 engaged in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff and that this was for the purpose of forcing and requiring the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned." (T.R. 1100.)

Supplementary Instruction No. 3 stated in part as follows:
"In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts of its officers and agents and, hence, there is no issue for you to decide as to Local 16." (T.R. 1101-1102.)

A further evil of Instruction No. 6 lay in the fact that it was the first indication to either appellant that it was charged with a conspiracy. The complaint of appellee did not allege a conspiracy between appellants. At no time during the trial did appellee advance a theory that the International's liability was based on its alleged responsibility as a co-conspirator with Local 16 for the acts done by the latter's agents. At no point in the trial did the trial court mention the theory of a conspiracy between appellants, nor rely on such a theory to support any of his rulings on the admissibility of evidence. In short, appellant International was given no notice whatever that it was being accused of a conspiracy with Local 16 upon which its responsibility for the acts of the Local could be predicated until both sides had rested. It thus was effectively deprived of any opportunity to introduce evidence negating the existence of a conspiracy. The prejudice to the International of Instruction No. 6 was two-fold: first, it permitted the jury to consider a basis for the International's liability which was substantially broader than the agency theory of liability and was totally unwarranted under the provisions of the Act; and second, since it was given by the trial judge after all the evidence was in, it deprived the International of notice of and an opportunity to refute a basis for its liability which was substantially different from the agency theory.

The prejudice which resulted to the International from Instructions Nos. 6 and 7 is strikingly illustrated by applying them to the facts in the case of

Perry Norvell Co., 80 N.L.R.B. 225 (1948). In that case the Board was required to determine, among other issues, the responsibility of a national labor organization for unfair labor practices committed by a local union. The extent to which an official of the national union had participated in a strike of the local union is shown by the following excerpt from the Board's decision:

> "Hutchinson was the principal official of United active among the employees of the Company. He was in Huntington about half the time between August 19 and October 28, 1947, working with the employees of the Company. He addressed meetings of employees, including the two meetings at which the Committee was formed, gave advice as to publicity and other matters, was in and about the plant before and during the strike, and was frequently present at strike headquarters. There is no evidence to show that Hutchinson was responsible for the calling of the strike. On one occasion, however, he was heard urging the strikers 'to stick it out' until the company should be willing to see their Committee. Several times Hutchinson loaned the strikers sound equipment belonging to United. At one meeting of strikers, he brought in a motion picture projector and showed a film produced by United Electrical Workers, C.I.O. Hutchinson collected about $145 from the employees in another shoe factory and turned this money over to the Committee. He also brought up individuals who contributed funds to the Committee. None of this money came from United or any of its locals. United stipulated that, in all that he did, Hutch-

inson acted within his authority. The other officials of United, George Martin, Clifford Johnson, Norman Bartlett, and Julius Crane, also appeared to have been active among the strikers, but to a considerably lesser extent than Hutchinson." (80 N.L.R.B. 225, at 233; footnotes to the Board's decision omitted.)

Despite the stipulation of his principal that in all that he did, Hutchinson acted within his authority,[46] the Board, applying the common law rules of agency, held that the national union was not responsible. It stated:

"As to *United,* the record clearly shows that responsible direction and control of the strike remained in the Committee at all times; it does not show that United was a co-sponsor of the strike. Although employees who later became active Committeemen, including Randolph Johnson, the Committee chairman, initially sought the aid of United, at no time did United or its locals furnish financial assistance to the Committee. The record shows that advice given by United's representatives during the strike was furnished at the request of the strikers and of the Committee, which remained free to accept or to reject it. In addition, the record is barren of any evidence that any representative of United incited, committed, participated in, or even observed or knew of any of the acts of restraint or coercion which we have found were committed. Finally, the decision whether to continue or to end the strike rested at

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[46] No such stipulation was made by the International with respect to the activities of Albright in this case.

> all times with the Committee. We are of the opinion, therefore, that, under common-law rules of agency which the Board is required to apply, these facts establish, at best, a remote relationship between the Committee and United and do not lead to the conclusion that the Committee was an agent of United, or that United was a co-sponsor of the strike with the Committee." (*Ibid.,* at 247; footnotes to the Board's decision omitted.)

Had the responsibility of the national union in that case been tested by Instructions Nos. 6 and 7 of the trial Court here, there is no doubt that it would have been held liable.

The error committed by the trial Court in giving Instructions Nos. 6 and 7 was so fundamental that the judgment must be reversed irrespective of the presence in the record here of some evidence that the International might have been responsible. The error here was similar to the one committed by the trial court in *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395 (1947). The language of the Supreme Court in that case concerning the necessity for reversing the judgment because of such an error is equally applicable here:

> "No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. * * * There is no way of knowing here whether the jury's verdict was based on facts within the condemned in-

structions, * * * or on actual authorization or ratification of such acts, * * *" (330 U.S. 395, at 408-409.)

"Our only point is this: Congress in § 6 has specified the standards by which the liability of employee and employer groups is to be determined. No matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed." (*Ibid.,* at 410.)

The trial court made additional errors in the other instructions with which we are here concerned. In Supplementary Instruction No. 3 it removed from the jury's consideration the only issue which Supplementary Instruction No. 2 had left for it to decide with respect to Local 16. The latter instruction had directed the jury to find that the conduct of Local 16 was unlawful, and hence left for it to determine only whether damages proximately resulted therefrom. By the last paragraph of Supplementary Instruction No. 3 even this issue was removed from the jury. That paragraph provided:

"In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts of its officers and agents and, hence, there is no issue for you to decide as to Local 16." (T.R. 1101-1102.)

In Supplementary Instruction No. 4 the trial court distorted otherwise correct instructions concerning the scope of employment of agents by the following language:

"Ordinarily the question whether a certain act is within the scope of employment of an agent of a

> labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. *Here the acts alleged are not of that kind.*" (T.R. 1102; italics supplied.)

This made the instruction prejudicial to the International, for the portion quoted was in effect a direction to the jury to find that everything done by Albright was within the scope of his employment as an International Representative of the International, and therefore bound the International. In the light of Albright's own testimony that he acted solely on behalf of Local 16 in the dispute, it removed from the jury the important question of whether Albright's employment by the International to act on behalf of its locals and at their request (T.R. 17-18) made his acts *on their behalf* acts of the International as well. It is clear that the similar question of whether an employee of a holding corporation bound that entity when he was employed by it to assist, and did assist, its subsidiary corporations at their request, would be for the jury to decide on general agency principles.[47] The court should have gone no further in this case.

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[47]Cf. the statement of Senator Taft in Congressional debate on the Act: "All this proviso does is to determine the question whether an agent of a labor union should have applied to him *the ordinary common law rule of agency.* Why a labor union should not be responsible for its agents, under the same rules of law that make a corporation responsible for its agents, I cannot understand. That is what this does." (93 Daily Cong. Rec. 6680, June 6, 1947; *Legislative History,* page 1599.) (Italics supplied.)

In summary, it can be stated that each of these errors in instructions standing alone was prejudicial to the appellants. Viewed together, they are even more aggravated and make a reversal of the judgment manifest.

(b) Specifications of error 3 (g) and (i).

The trial Court refused to give appellants' requested Instructions Nos. 1, 2, 12 and 13 to the jury. These instructions stated the public policy of the United States with respect to labor disputes as embodied in the Act,[48] as well as the purposes and policy of the Act itself.[49] By them appellants proposed to tender to the jury as an issue for its consideration the effect of the conduct of appellee on its right to recover damages. By refusing to give these instructions, the trial court ruled that the conduct of the appellee in the dispute could neither constitute a defense to the action against appellants, nor be considered in mitigation of damages.

It is submitted that this ruling of the trial Court was erroneous, and prejudiced both appellants. If the appellee's own wrong-doing caused the appellants' activities, the appellee had no right to recover. "No one may take advantage of his own wrong." (*In re F. P. Newport Corp.*, 98 F. (2d) 453 [9 Cir., 1938].)

The record shows that the appellee's own wrong-doing caused the acts of which it complained. Early in August, 1947, Eugene S. Hawkins, General Man-

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[48]Appellants' requested Instructions Nos. 12 and 13. (T.R. 43-44.)

[49]Appellants' requested Instructions Nos. 1 and 2. (T.R. 34-36.)

ager of appellee, had promised Albright that if Local 16 and Local M-271 reached an agreement concerning the work to be done for appellee by the longshoremen, the appellee would be perfectly agreeable to such an arrangement. (T.R. 181-182.) The appellee repudiated this commitment when it rejected, early in April, 1948, the adjustment which had been reached between the two locals. The cross-examination of Hawkins on the matter reads as follows:

> "Q. Later on you had a number of meetings with representatives of Local 271 and Local 16 in which Local 271 asked you to turn that work over, namely the loading of the lumber, to Local 16; isn't that true?
>
> A. Yes.
>
> Q. And you still said that you couldn't do so because you had assigned that work to Local 271 which was now asking you to turn the work over to Local 16. Is that the position you took then?
>
> A. Yes.
>
> Q. At this time if your sole reason for not assigning this work to Local 16 was because you had turned it over to 271 and 271 asked you to turn it over to 16, your contention was no longer tenable; isn't that true?
>
> A. Yes—that wasn't the sole and only reason that developed.
>
> Q. You found another reason?
>
> A. Another reason had been developed by that time.
>
> Q. You never mentioned that reason either to representatives of 271 or of 16, did you?
>
> A. I don't recall any specific instance; no."
>
> (T.R. 238-239.)

The additional reason referred to by Hawkins was totally unrelated to the cost of appellee's operations. (T.R. 257.) It was described by Eugene H. Card, the appellee's Labor Relations Advisor (T.R. 297) as follows:

"Q. What is the Company's objection to hiring longshoremen to load barges?

* * * * * * *

A. Because we have an agreement with another union under which that work is covered. We can't break our agreement with the I.W.A. and take the work away from them and give it to somebody else just because they come along and ask for it." (T.R. 306.)

"Q. Did you have any objection to making two contracts, with two organizations?

A. Yes, of course.

Q. What were the reasons for it?

A. You can't take work away from one group of men and give it to somebody else.

* * * * * * *

Q. If you took the work away—did it make any difference to you who did the work? Who did you want to do the work?

Mr. Andersen. That is a complex question.

Q. Did it make any difference to the company?

A. It made a difference in this respect; yes. We couldn't permit the I.W.A. to violate their agreement any more than they would permit us to violate ours.

Q. Of course people can call off an agreement if they want to?

A. Yes.

Mr. Andersen. I object.

Q. Why were you unwilling to void the agreement with the I.W.A. and draw up another excluding barge work?

A. If we had let the agreement go then and sign with the longshoremen, the next day some other union would be down and say, 'We want an agreement covering machinists,' or, 'We want an agreement covering painters,' or, 'We want an agreement covering carpenters.' We weren't just going to open road to everyone in the Territory coming in and covering small groups of people.

Q. Was there any other reason you can think of now?

A. None that I know of; no." (T.R. 309-310.)

The refusal of appellee to live up to its word was totally uncompromising. Leonard Evans, the Alaska representative of the United States Department of Labor (T.R. 985), who had been assigned to attempt to conciliate the dispute (T.R. 986), was informed by Hawkins that the appellee would close the plant down rather than deal with the longshoremen. (T.R. 988-989.) This unyielding attitude of the appellee put an end to negotiations which quickly could have settled the entire dispute. The testimony of Evans reveals the following:

"A. * * * I tried to get a meeting of the representatives of the sawmill, representatives of the Company and representatives of the Longshoremen.

Q. Were you successful in getting Mr. Hawkins to agree to such a conference?

A. Either then or later I was successful in getting the three parties to meet for a very short time in the Commissioner of Labor's office.

Q. When was that?

A. If I remember right, it was a Friday afternoon.

Q. About when?

A. In the same week.

Q. Were your conciliations successful then or unsuccessful?

A. When we left I was hopeful. We had scheduled a second meeting for the following Monday. All three parties at that time indicated they would all show up. On Monday the Company representatives didn't show up. When I phoned to remind them they said 'No soap—no meeting.'

Q. That is, they refused to meet, did they?

A. Yes." (T.R. 990-991.)

In addition, the record was uncontradicted that the appellee knew that if it had kept the commitment it had made to observe the understanding reached between Local 16 and Local M-271, the mill would have continued to operate. Hawkins testified as follows on cross-examination:

"Q. And from that point on all they requested was that you turn the work over to them from the bull rail out; that is correct, isn't it?

A. From the bull rail out; yes.

Q. But of course you insisted that the I.W.A. continue to do the work; isn't that correct?

A. Yes.

Q. And despite the fact that four men would only be used part time, you shut down the mill rather than hire these two or four longshoremen; is that true?

A. No.

Q. You didn't give the work to the longshoremen?

A. We didn't shut down the mill——

Q. You didn't give the work to the longshoremen?

A. No.

Q. You knew, if you gave the work to the longshoremen, all the men would return to work and the mill would function at full blast, didn't you?

A. Yes, I presume." (T.R. 270-271.)

In the light of the public policy of the Act with respect to the settlement of labor disputes, the jury should have been permitted to consider this breach by the appellee of its previous commitment and its uncompromising refusal to negotiate a settlement. It might well have concluded that the appellee's own wrongdoing, under the terms of the very statute upon which it relied for relief, should defeat its right to recover, or at the very least, diminish the damages to which it otherwise might be entitled.

Since appellee's cause of action was a statutory tort, the rule of diminution of damages was applicable. That rule is given by the *Restatement of Torts* as follows:

"Sec. 918. Avoidable Consequences.

"(1) Except as stated in Subsection (2), a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.

"(2) A person is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended such harm or adverted to it and was recklessly disregardful of it, unless the injured person with knowledge of

the danger of such harm intentionally or heedlessly failed to protect his own interests."

By substituting the statutory duty of the appellee (to bargain in good faith and to utilize fully the Conciliation Service of the Federal Government), for the "due care" referred to in the Restatement section, the requested instructions would have submitted the Restatement rule to the jury. Further, irrespective of the statutory policy, the appellee's duty to mitigate damages might well have included an obligation to comply with the request of Local 16 and Local M-271 concerning its barge loading, and thus prevent the closing of its mill, pending a final settlement of the dispute. An analogous situation occurred in *Alcoa Steamship Co. v. Conerford,* 25 L.R.R.M. 2199 (D.C. S.D. N.Y. 1949). There, stevedoring and steamship companies sued local unions of longshoremen[49a] for breach of contract, under the provisions of Sec. 301 of the Act.[50] The breach consisted of the refusal of the longshoremen's unions to furnish gangs of men to load or unload vessels unless the number of men to be employed in the hold of each vessel was restricted to eight. The court's opinion was concerned solely with the question of the amount of

[49a]The defendants there were affiliated with the International Longshoremen's Ass'n (AFL) with which appellants have no connection.

[50]The pertinent portion of Sec. 301 reads as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U.S.C. Supp. (1949), Sec. 185.)

damages to which the various plaintiffs were entitled, it being conceded that the collective bargaining contract had been breached. In considering the specified damages claimed by one plaintiff to have arisen from a six-day work stoppage by the longshoremen, the court stated:

> "It can be seen that Cunard did not follow the practice of the Cuba Mail Co. and permit the loading of the ships with eight men in the hold once it became clear that no longshoremen would work if more than eight were demanded. Instead, it allowed six days to elapse in which no work was done. This upset the carrier's schedules and caused the damages to mount. Nederlandsch Amer. S.M. v. Stevedores' and L.B. Soc., 265 Fed. 397, E.D. La. 1920, is authority for the proposition that in such a situation the steamship company is under a duty to mitigate damages. I find that it was not unreasonable for Cunard Limited to wait until August 22, 1947, before undertaking the loading of the SS. Port Melbourne and the SS. Sibley Park in an effort to induce Local 791 to comply with the contract. But in view of the known imminent arrival of the SS. Media it was unreasonable to delay past that date, because to do so would have jeopardized Cunard's chances of adhering to its shipping schedule. On the evidence, it appears that Local 791 would have been willing to load the SS. Port Melbourne and the SS. Sibley Park with eight men in the hold starting August 22, 1947, and that the work could have been completed and the ships removed by the time the SS. Media arrived on August 27, 1947. For this reason the claims for rerouting the SS. Media cannot be allowed,

> nor can the claims incident to meat which had spoiled before loading on the SS. Port Melbourne. Of the remainder, one-third will be allowed since delay for two of the six days has been found to have been reasonable. This figure is $5,156.35." (25 L.R.R.M. at 2201.)

The case of *Nederlandsch Amer. S.M. v. Stevedores' and L.B. Soc.,* 265 F. 397 (D.C. E.D. La., 1920), which was relied on above, also involved an attempt to recover for breach of a collective bargaining agreement. The members of the defendant longshoremen's union[50a] there involved had declined to work for plaintiff at the wages specified in a collective bargaining contract, and had struck for higher wages. The plaintiff sought damages based on demurrage which accrued while its ship lay unloaded because of the strike. The court stated:

> "This brings up the question of damages. Undoubtedly the ship was delayed and demurrage accrued; but this might have been avoided by paying the extra wages demanded. The recovery should be confined to what it would have cost for additional wages to unload the ship at the rate demanded." (265 F. 397, at 400.)

In the light of these authorities, as well as the uncontradicted evidence in the record that appellee had repudiated its own commitment and failed to observe the public policy of the Act, it is clear that the jury was entitled to consider the issues included in appellants' requested Instructions Nos. 1, 2, 12 and 13.

[50a]The defendant there was an independent union, with which appellants have no connection.

Had it done so, its verdict might have been for appellants, or for a lesser amount.

(c) Specification of error 3 (j).

The only remaining error in instructions to be discussed under this portion of the Argument[51] is the trial court's failure to comply with appellants' request that the provisions of Sec. 8(c) of the Labor Relations Act be embodied in an instruction to the jury. That section provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

The trial court did not define for the jury the meaning of the terms "induce" or "encourage", which appear in its Instructions Nos. 2, 3, 5 and 6, and its Supplementary Instruction No. 2. The expression by one person to another of views, argument, or opinion on any issue certainly constitutes an inducement to action and comes within the ordinary meaning of the terms "induce" or "encourage".[52]

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[51]The two other instructions included in appellants' Specification of Errors are integrally related to the trial court's ruling on a matter of evidence, and hence are discussed below, page 105, in the section of the Argument concerned with the trial court's rulings on evidence.

[52]Cf. the opinion of Rutledge, J., in *Thomas v. Collins,* 323 U.S. 516 (1945): " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." (323 U.S. 516, at 537.)

The instructions given by the trial court, not limited by the provisions of Sec. 8(c), permitted the jury to find that the International had "induced" or "encouraged" within the meaning of the Act, simply if it had expressed views, argument or opinion on the dispute in Juneau to any other labor organization. This would be the case even though such expressions contained no threat of reprisal or force or promise of benefit. Under the unfair labor practice provisions of the Labor Relations Act, however, such expressions would not be actionable.

It would be redundant to repeat here the arguments already fully discussed under Part I hereof, *supra*, at pp. 35-37, which prove that the provisions of Sec. 8(c) are limitations on Sec. 303(a)(4) as well as on Sec. 8(b)(4)(D). The trial court, therefore, erred in failing to give the instruction requested by appellants which would have so limited Sec. 303(a)(4). That this error resulted in prejudice to the International can be easily demonstrated.

Appellants' Exhibit 24 was a portion of an article which had appeared in the "Dispatcher", the official publication of the International. (T.R. 973.) It contained the following statement:

> "I.L.W.U. Second Vice-President Germain Bulcke has informed all Canadian I.L.W.U. locals that Juneau Spruce Mill products are unfair." (T.R. 978.)

Under the instructions given the jury, not limited by the provisions of Sec. 8(c), the jury was required to find that the International by so informing its

Canadian locals had induced or encouraged the employees of other employers to refuse to handle products of the appellee. Yet, in the case of *Grauman Co.*, 87 NLRB No. 136 (1949), the National Labor Relations Board held that a similar "unfair" designation did not constitute the inducement and encouragement which was prohibited by the Labor Relations Act. A reading of the *Grauman* case together with the case of *Osterink Construction Co.*, 82 NLRB 228 (1949), which it overruled, indicates that the ruling concerning "unfair" lists in the *Grauman* case was based on the limitations contained in the provisions of Sec. 8(c). The refusal of the court to give this requested instruction of the appellants thus prejudiced the International on the question of its responsibility for the refusal of the longshoremen at Prince Rupert, British Columbia, to handle appellee's lumber at that port. (T.R. 619.)

IV.

PREJUDICIAL ERROR TO APPELLANTS RESULTED FROM THE TRIAL COURT'S RULINGS ON EVIDENCE.

(a) Specification of error 4 (a).

Over the objections of appellants, the trial court permitted the introduction of hearsay testimony that the appellee was unable to ship its lumber to Seattle or Tacoma because it was unable to have its barges unloaded at these ports. (T.R. 692-695.) This inability to ship was advanced as the reason for the closing of appellee's mill on October 11, 1948. (T.R. 696.) The trial court recognized the duty of appellee to

mitigate damages in ruling on an objection to the admission of other evidence. (T.R. 719.) The question of whether the appellee was in fact foreclosed from shipping to these ports and hence required to close its mill was material to the jury's consideration of whether appellee had taken all reasonable steps to reduce its losses.

An examination of the pertinent excerpt from the record (T.R. 692-695) reveals that the information upon which the witness Schultz relied to testify that the ports of Seattle and Tacoma were closed to appellee was based on investigations made by others. (See *supra,* pages 30-33.) This testimony was clearly hearsay, since the extra-judicial declarations of others were offered to prove the truth of such declarations, and none of such declarants were available for cross-examination by the appellants. Had the testimony been stricken, as it should have been, the jury might have concluded that the appellee was not compelled to close its mill on October 11, 1948, because of the activities of Local 16, but had done so to make essential improvements and alterations in its production system, and to remove "bottlenecks" which had been placed there by Hawkins, the former General Manager. (T.R. 448-450, 696-697.) In that event, the size of its verdict would have been substantially affected. The introduction of the testimony in question was therefore prejudicial to appellants.

(b) Specifications of error 3 (c) and (h) and 4 (b).

Appellants' Exhibit C established the existence of a contract between Local 16 and the appellee's prede-

cessor under which the latter agreed to employ persons represented by Local 16 to perform its longshore work. (T.R. 662-663.) The trial court held as a matter of law that this contract was not binding on the appellee, and so instructed the jury. (Instruction No. 11, *supra,* page 20.) It admitted the contract in evidence for the limited purpose of showing that such a contract existed between Local 16 and appellee's predecessor. (T.R. 927-930.) It refused appellants' requested instruction which would have submitted the question of the existence of a contract between appellee and Local 16 to the jury. (Requested Instruction No. 11; T.R. 41-42.)

Counsel for appellee conceded at the trial that the existence of a contract between Local 16 and the appellee, under which the latter had agreed to hire longshoremen for particular work, would have materially affected the legality of the efforts of Local 16 to enforce the rights of its members to such work. (T.R. 654.) Had the court submitted the question of the existence of such a contract to the jury, it would have been required, under appellee's own concession, to give it further instructions defining the effect of such a contract upon the rights of Local 16 to engage in the activities with which it was charged. Since the court erred in removing this question from the jury, the appellants were denied the benefit of further instructions limiting their liability, and were thereby prejudiced.

Among other things, appellants sought to show that such a contract between Local 16 and the appellee

could be implied from the course of conduct between them. (T.R. 925.) The evidence to support such an implied contract included the following: (1) The appellee never informed Local 16 that it repudiated the latter's contract with the appellee's predecessor. (T.R. 942.) (2) After the take-over, it continued to hire longshoremen in the same manner and for the same work as had its predecessor. (T.R. 933, 667-668.) (3) It instituted a wage increase for the longshoremen it hired at the same time that such an increase was negotiated by Local 16 with other employers of longshore labor in Juneau. (T.R. 932.) (4) No discussions were held from which could be implied an intention on the part of appellee to change the relationship which had existed between its predecessor and Local 16. (T.R. 667-668.)

It is submitted that these facts neither negate nor affirm the existence of an implied contract between appellee and Local 16 as a matter of law. Whether the mutual assent necessary to the formation of a contract could be implied from the foregoing conduct of the parties was a question of fact for the jury to decide.

> *Howell v. Grocers Inc.*, 2 F.2d 499 (6 Cir., 1924);
>
> *Martin v. Campanario*, 156 F.2d 127 (2 Cir., 1946), cert. denied 329 U.S. 759 (1946).

The court's failure to submit the question to the jury prejudicially deprived appellants of a defense to which they were entitled.

CONCLUSION.

When the foregoing Argument is reviewed as a whole, it becomes plain that the judgment of the trial court was based on fundamental error committed at the threshold of the case. It has further been demonstrated that additional basic errors were committed within the erroneous framework upon which the decision of the court on appellants' demurrer left the case to be tried. In view of the nature of these errors and the prejudice which resulted to appellants therefrom, it is respectfully submitted that the judgment below should be reversed.

Dated, San Francisco, California,
September 22, 1950.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

JURISDICTION.

Section 303 of the Labor-Management Relations Act, 1947, provides:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the

provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." (29 U.S.C. Supp. [1949] Sec. 187.)

Section 1291, 28 U.S.C. provides:

"Final Decisions of District Courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Terri-

tory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1294 (2), 28 U.S.C. provides:

"Circuits in which Decisions Reviewable. Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: * * *

* * * (2) From the District Court for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit;"